Supreme Court of the United States

October Term, 1946

No. 86

W. C. ALLRED; CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH; BISCAYNE BEACH THEATRE, INC.; T. N. CARNAHAN; CENTRAL AMUSEMENT COMPANY, INCORPORATED; EMMA COX; W. F. CROCKETT, DAVID PENDER, JR., THELMA H. CROCKETT AND MRS. E. P. THOMPSON, PARTNERS TRADING AS BAYNE-ROLAND THEATRES; H. A. EVERETT; WILLIAM R. GRIFFIN, SALLIE M. WISE AND FRANK V. MERRITT, PARTNERS TRADING AS CULLMAN AMUSEMENT COMPANY; NAT HANCOCK; J. O. HARRIS AND E. L. HARRIS, TRADING AS J. O. AND E. L. HARRIS; J. B. HARVEY; LEXINGTON AMUSEMENT COMPANY, INC.; M. C. MOORE; W. W. MOWBRAY; NEIGHBORHOOD THEATRE, INC.; PALACE AMUSEMENTS, INC.; BENJAMIN T. PITTS; HENRY REEVE; RITZ, INC., THEATRE; STRAND AMUSEMENT COMPANY, INCORPORATED; THE SOUTHERN AMUSEMENT COMPANY, INCORPORATED AND SIDNEY WHARTON;

Appellants

against

THE UNITED STATES OF AMERICA, ET AL.

APPELLANTS' BRIEF

(Intervenors)

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Grounds Upon Which Jurisdiction is Invoked.

This is an appeal from an order of the District Court for the Southern District of New York denying intervention to these appellants (hereinafter called Intervenors) and from the decree of that Court insofar as it directs the method by which feature films are to be marketed, generally

referred to as "competitive bidding". A motion for leave to intervene in this Court is also now pending. The opinions of the Court below are reported in 66 F. Supp. 323 and 70 F. Supp. 53 and 76.

The jurisdiction of this Court is invoked pursuant to 15 U. S. C. A., Section 29, known as the Expediting Act, and reading as follows:

> "*Sec. 29. Appeals to Supreme Court.*
>
> In every suit in equity brought in any district court of the United States under sections 1-7 or 15 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof. Feb. 11, 1903, c. 544, Sec. 2, 32 Stat. 823; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167."

The decree was entered in an action brought by the United States under that section of the Act of July 2, 1890 commonly called the Sherman Antitrust Act which provides:

> *Sec. 1.* Trust, etc. in restraint of trade illegal; exception of resale price agreements; penalty
>
> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are law-

ful; as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Sec. 2. Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The motion for leave to intervene in the District Court was brought under Rule 24 (a) and (b) of the Federal Rules of

Civil Procedure, 28 U. S. C. following Section 723 (c). Federal Rule 24 (a) and (b) reads as follows:

> "(a) *Intervention of right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."
>
> "(b) *Permissive intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Cases supporting Intervenors' rights to appeal to this Court from the order denying their motion to intervene are as follows:

Missouri-Kansas Pipe Line Co. v. *U. S.*, 312 U. S. 502;

U. S. v. *Terminal Railroad Ass'n of St. Louis*, 236 U. S. 194;

Brotherhood of Railroad Trainmen v. *Baltimore & Ohio Railroad Company*, 91 L. E. 1301. Decided June 9, 1947;

Wolpe v. *Poretsky*, 144 F. (2d) 505.

Cases supporting Intervenors' right to appeal to this Court from the final decree of December 31, 1946 are as follows:

U. S. v. *Terminal Railroad Ass'n of St. Louis*, 236 U. S. 194;

U. S. v. *Crescent Amusement Co.*, 323 U. S. 173;

U. S. v. *Bausch & Lomb Co.*, 321 U. S. 707.

The jurisdiction of the Court to consider and pass upon the motion to intervene in this appeal is based on Rule 24 (a) of the Rules of Civil Procedure as above set forth, the inherent power of the Court and the precedent of *United States* v. *Terminal Railroad Association of St. Louis, supra.*

Orders of this Court were entered June 23, 1947 stating that the jurisdiction of the Court to consider this appeal and consideration of the motion to intervene were postponed to the hearing of the cases on the merits.

Statement of the Case.

This statement is confined to matters material to the consideration of the questions presented by the appeal of these Intervenors.

The action was instituted by the United States pursuant to the Sherman Antitrust Act charging defendants with combining and conspiring to restrain and monopolize interstate trade in the production, distribution and exhibition of motion pictures. Intervenors are independent exhibitors of motion pictures or representatives of operators of over 2000 theatres in some twelve different states of the Union cooperating for their mutual benefit as a nonprofit association known as The Confederacy of Southern Associations. They have been accustomed to rent (license) motion picture films for exhibition in their theatres through defendants,

who distribute about 80% of the available supply of feature pictures in this country. No exhibitor can successfully operate without access to their production. *Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F. (2d) 738, 744-5. (Also R., p. 3517.)

On June 11, 1946 the Court rendered its opinion finding plaintiff's charges to be true in a number of respects (R., pp. 3504-3563). The opinion directed the entry of a decree carrying out its findings and, among other things, directed that such decree should provide as follows (R., pp. 3560-3561):

> "No defendant or its subsidiaries shall exhibit its films other than on its own behalf or through wholly owned subsidiaries, or subsidiaries in which it has an interest of at least ninety-five per cent, without offering the license at a minimum price for any run desired by the operators of each theatre within the competitive area. The license desired shall in such case be granted to the highest responsible bidder having a theatre of a size and equipment adequate to show the picture upon the terms offered. The license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers, or any person whatever. Each license shall be offered and taken theatre by theatre and picture by picture. No contracts for exhibition shall be entered into, or if already outstanding shall be performed, in which the license to exhibit one feature is conditioned upon an agreement of the licensee to take a license of one or more other features, but licenses to exhibit more than one feature may be included in a single instrument provided the licensee shall have had the opportunity to bid for each feature separately and shall have made the best bid for each picture so included."

Such a method of marketing had not been suggested by the parties or discussed in their briefs (see plaintiff's State-

ment as to Jurisdiction, p. 14) and had only been mentioned casually during the trial by counsel (R., pp. 2304, 2618, 2747-49) and in the testimony of witnesses (R., pp. 737-8, 1363, 1394-5). No witness favored it.

As promptly as possible after being advised of the opinion of the Court, Intervenors caused to be prepared and filed a petition to intervene (R., pp. 3578-96) for the purpose of eliminating from the decree the provisions above quoted. This petition, in addition to the allegations of inadequacy of representation, timeliness of application and the binding effect of the judgment, set forth in detail the various characteristics of the exhibitor Intervenors, the conditions necessary for profitable operation of their theatres, conditions material in the procurement of licenses, advantages of the present system of licensing, rental value considerations and necessity of adjustments after exhibition, methods of booking and the disastrous results to Intervenors and their property interests, of the selling system directed by the opinion, to all of which this Court is respectfuly referred.

No allegation of fact in the petition to intervene was controverted by any of the parties. The Intervenors' motion to intervene was argued by counsel and leave to file a brief in support of their contentions was granted. Other exhibitors and exhibitor associations made the same or like objections to the quoted provisions of the opinion so that, among the exhibitors of the nation operating some 15,000 theatres, there was substantial unanimity of opposition to any form of the decreed auction selling or competitive bidding.

On December 31, 1946, the Court made and filed its findings of fact and conclusions of law and its decree (70 F. Supp. 53). Concurrently with the filing of the findings

and decree, the Court filed a supplementary memorandum opinion (R., p. 3702, 70 F. Supp. 76). On January 21, 1947 the Court made its order denying the motion to intervene (R., p. 3718). In the decree of December 31, 1946 the Court decreed as follows (R., pp. 3695, 3696-7, 3700-1):

II.

"Each of the defendant distributors, Paramount Pictures, Inc.; Paramount Film Distributing Corporation; Loews, Incorporated; Radio-Keith-Orpheum Corporation; RKO Radio Pictures, Inc.; Warner Bros. Pictures, Inc.; Warner Bros. Pictures Distributing Corporation [formerly known as Vitagraph, Inc.]; Twentieth-Century Fox Film Corporation; Columbia Pictures Corporation; Columbia Pictures of Louisiana, Inc.; Universal Corporation; Universal Film Exchanges, Inc.; Big U Film Exchange, Inc.; and United Artists Corporation; and the successors of each of them, and any and all individuals who act in behalf of any thereof with respect to the matters enjoined, and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:

* * * * * * * * * * *

8. From licensing in the future any feature for exhibition in any theatre, not its own, in any manner except the following:

(a) A license to exhibit each feature released for public exhibition in any competitive area shall be offered to the operator of each theatre in such area who desires to exhibit it on some run [other than that upon which such feature is to be exhibited in the theatre of the licensor] selected by such operator, and upon uniform terms;

(b) Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others;

(c) Where a run is desired, or is to be offered, upon terms which exclude simultaneous exhibition in competing theatres, the distributor shall notify, not less than thirty days in advance of the date when bids will be received, all exhibitors in the competitive area, offering to license the features upon one or more runs, and in such offer shall state the amount of a flat rental as the minimum for such license for a specified number of days of exhibition, the time when the exhibition is to commence and the availability and clearance, if any, which will be granted for each such run. Within fifteen days after receiving such notice, any exhibitor in such competitive area may bid for such license, and in his bid shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make. The distributor may reject all offers made for any such feature, but in the event of the acceptance of any, the distributor shall grant such license upon the run bid for to the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor. The method of licensing specified in this subdivision shall not be required in areas where there is no competition among theatres or in run, or in which there is no offer made by any exhibitor within the time above mentioned. The words "exclude simultaneous exhibition" shall be held to mean the exhibition of a specified run in one theatre with clearance over other theatres in the competitive area. The words "competitive area" shall refer to the territory occupied by more than one theatre in

which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of features on any run.

(d) Each license shall be offered and taken theatre by theatre and picture by picture.

(e) A theatre is not a defendant's own theatre unless it owns therein a legal or equitable interest of ninety-five per cent or more, either directly or through affiliates or subsidiaries.

9. From arbitrarily refusing the demand of an exhibitor, who operates a theatre in competition with another theatre not owned or operated by a defendant distributor, or its affiliate or subsidiary, made by registered mail, addressed to the home office of the distributor, to license a feature to him for exhibition on a run selected by the exhibitor, instead of licensing it to another exhibitor for exhibition in his competing theatre on such run. Such demand shall be deemed to have been refused either upon the receipt by the exhibitor of a refusal in writing or upon the expiration of ten days after the receipt of the exhibitor's demand.

* * * * * * * * * * *

VI.

For the purpose of securing compliance with this Decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of antitrust matters, and on notice to any defendant, reasonable as to time and subject matter, made to such defendant as its principal office, and subject to any legally recognized privilege, (1) be permitted reasonable access, during the office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other

records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Decree, and that during the times that the plaintiff shall desire such access, counsel for such defendant may be present, and (2) subject to the reasonable convenience of such defendant, and without restraint or interference from it, be permitted to interview its officers or employees regarding any such matters, at which interview counsel for the officer or employee interviewed and counsel for such defendant company may be present.

Information obtained pursuant to the provisions of this section shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings to which the United States is a party, or as otherwise required by law.

* * * * * * * * * * *

VIII.

Jurisdiction of this cause is retained for the purpose of enabling any of the parties to the judgment and no others, to apply to the court at any time for such orders or direction as may be necessary or appropriate for the construction, modification, or carrying out of the same, for the enforcement of compliance therewith, and for the punishment of violations thereof, or for other or further relief."

While the provisions of the decree somewhat modified the competitive bidding procedure outlined in the opinion, Intervenors still believe they and their property interests will suffer irreparable damage if the decree stands as written, and, accordingly, have appealed from the order denying intervention and from the provisions of the decree directing competitive bidding. The defendant Paramount

and the non-exhibitor defendants, Columbia, Universal and United Artists, have also appealed from the competitive bidding provisions of the decree (R., pp. 3745-6, 3760-1, 3797, 3783-4). Plaintiff has assigned error (R., pp. 3722-3) on the ground that the competitive bidding decreed would not be effective to eliminate unreasonable discrimination.

By order of this Court dated June 23, 1947 consideration of the appeal and of the motion to intervene was postponed until the hearing on the merits.

Specification of Assigned Errors Relied Upon.

1. The United States District Court for the Southern District of New York erred in refusing to grant Intervenors' application to intervene as of right in the above-entitled action.

2. The said Court erred in making the order, entered January 23, 1947, denying Intervenors' application to intervene.

3. The said Court erred in holding (if so held) that its judgment of December 31, 1946 is not binding on these Intervenors.

4. Said Court erred in holding (if so held) that representation of Intervenors' interests was adequate.

5. Said Court erred in holding (if so held) that Intervenors' application was not timely.

6. The said Court erred in including in its final decree entered December 31, 1946 and more particularly in Section II thereof, the portions of paragraph 8 quoted above (pp. 8-10).

7. The said Court erred in holding that it was empowered and authorized under the provisions of the Sherman Anti-Trust Act to include in its decree the above quoted paragraphs.

SUMMARY OF ARGUMENT.

I. Intervenors should have been permitted to intervene in the District Court and should now be permitted to intervene in this Court for the following reasons:

A.

They are bound by the Decree.

Due to the perishable character of the product dealt with and its limited useful life to the buyer-exhibitor; the necessity for a supply assuring continuous operation; the large number of features required each year; the necessity of offering the public a variety of attractions as well as the many other complexities of the exhibition business, the competitive bidding provisions of the decree can only bring about hopeless chaos in the business of the exhibitors. They will be irreparably damaged and they have no remedy except through intervention in this case. Under the authorities this is sufficient to make the decree binding upon them under the provisions of Rule 24 (a).

B.

The representation of Intervenors' interests was and continues to be inadequate.

An examination of the record shows that the interests of the independent exhibitor were completely disregarded. Counsel for the Government, who would naturally be expected to protect the independent exhibitor's interests, concentrated his efforts, and still concentrates his efforts, in seeking to bring about divestiture of the theatres of the major defendants. His objections to the competitive bidding features of the decree are based only on his contention that these provisions are not an adequate substitute for divestiture. The three "minor" defendants who now attack competitive bidding make their attack from the point of view of their own interests, which are in many respects diametrically opposed to those of the independent exhibitor.

C.

The application to intervene was timely made.

This has been in effect conceded by the Court below and counsel.

D.

The motion to intervene in this Court should be granted.

The authorities sustain the right to intervene directly in an appeal to this Court and the same should be allowed for the same reasons that it should have been allowed by the District Court as above set forth.

II. The dissolution and trade practice reliefs other than the competitive bidding requirement will terminate the restraints found to be unlawful.

An analysis of the various trade practices which the District Court found were used in restraint of trade and of the effect thereon of the provisions of the decree other than the provisions of Section II, paragraph 8, shows that the latter provisions are unnecessary to effect the purposes of the decree. The other injunctive provisions coupled with the visitorial power of the Attorney General and the reservation of jurisdiction is adequate.

III. The directions as to competitive bidding are not authorized under the Sherman Act but are directly contrary to the spirit of the Act.

It is conceded, as it must be, that the District Court has reasonable discretion in molding a decree so as to make it completely effective in eliminating abuses found to exist. Its discretion does not, however, extend to the inclusion of

provisions, unnecessarily destructive of the property and interests of innocent parties. Certainly a decree directing the inauguration of a system which, as here, brings about a restraint of trade for the benefit of those against whom relief is sought, cannot be justified.

Conclusion.

For the reasons above stated, intervention should be allowed and the competitive bidding provisions of the decree should be eliminated.

THE ARGUMENT.

POINT I.

Intervenors should have been permitted to intervene in the District Court and should now be permitted to intervene in this Court.

As long as Intervenors are permitted to intervene it is of no moment whether intervention is based upon the original motion in the statutory court or on the motion filed in this Court. While Rule 24 (a) of the Rules of Civil Procedure is specifically restricted to the District Courts, since there is no rule in this Court dealing with intervention it is submitted that the spirit and intent of Rule 24 (a) should be applied in determining whether persons whose rights are vitally affected should be heard.

All the requirements for intervention as of right under Rule 24 (a) were satisfied, namely, (a) the Intervenors are bound by the judgment in the action, (b) the representation of Intervenors' interests by existing parties was and continues to be inadequate, and (c) the motion was timely made.

A.

Intervenors are bound by decree.

(1) *Nature of Business.*

The Court has postponed consideration of this appeal and of the pending motion to intervene until the hearing on the merits. We understand that if it be shown that the decree has an adverse effect on the applicant and the practical necessities grant him a right to intervene, the order denying the intervention is appealable. (*Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio*, 91 L. E. 1301.) The adverse effect and the practical necessities can only be tested by a consideration of the nature of the business and the impact upon it of the decretal provisions complained of.

Over a period of years experience has established certain trade practices growing out of the specialized nature of the business of motion picture exhibition and by reason of the perishable character of the product which has a very limited useful life to the individual buyer-exhibitor. For this reason considerations which justified decrees fixing sales methods in cases of heavy equipment as in the *International Salt*, 16 Law Week 4005, November 10, 1947; *Hartford-Empire*, 323 U. S. 386 and *Pullman Company*, 64 F. Supp. 108 cases are not applicable.

First, it is absolutely essential that the purchaser (exhibitor) shall be assured of a supply of features sufficient to maintain continuous operations. The exhibitor must look to the defendants for this continuous supply of features as the defendants control 80% of the pictures. *Goldman Theatres, Inc.* v. *Loew's Inc., supra.* If a picture is changed once a week, the exhibitor must license 52 pictures in a year, and if twice a week, 104 pictures. These figures are doubled if double (two) features are shown at each performance.

A second consideration is the location and suitability of the theatre; the reputation the theatre enjoys in the community for showing a certain type of picture or the features of a certain producer; the efficiency of the management; and all the other factors that enter into the success of any commercial enterprise.

A third consideration relates to the variety of attractions offered. At present, a first run theatre is allowed to exhibit all of the features of one or more distributors which it desires to exhibit. The theatre can offer its patrons assorted and balanced programs at a uniform price, although some features cost millions to produce and other pictures cost a lesser amount. An exhibitor who showed nothing but animal pictures week after week would be obliged soon to close his doors. He must ever be careful in the selection of the star performers because their popularity varies with localities.

Upon obtaining a license to exhibit a film only the first and in many respects the least important step had been taken. The second step and the one necessary to take care of the above requirement is the "booking". For details of this operation and the highly specialized duties of a "booker" we respectfully refer to pages 3588-90 of the Record.

Another pre-exhibition step is the publicity in which the exhibitor and distributor ordinarily join forces.

Some idea may be gained of the complexity of the operation by examination of a typical contract annexed hereto Exhibit F-10 (Adm. R., p. 1067).

The final important feature of the business vital to anyone engaged therein is that it is, to use a colloquial term, a "show" business. The mysterious, unpredictable but all-governing factor is the public taste. Over the years dis-

tributors and exhibitors have come to recognize the element of probable error in fixing by the bargaining process the compensation to be paid for exhibiting a film and a universal trade practice has become effective under which, if a film failed to meet expectations, an equitable adjustment is made in favor of the exhibitor. These adjustments are justified from the interest of the distributor because they have maintained his outlets and induced the exhibitor to accept and show films of uncertain appeal with a reasonable assurance of protection against loss and complete assurance of receiving the better films.

As a result, under the existing method of licensing films, an exhibitor has been enabled to have available for exhibition in his theatre or theatres all of the pictures distributed by one or more of the defendants over a period of years, either under agreements made annually, or under agreements made with respect to individual pictures or with respect to small blocks of pictures.

The essential requisites from an exhibitor's standpoint of this established method of buying and selling (licensing) features will be done away with if the competitive bidding provisions of the decree are permitted to stand, with disastrous results to Intervenors and their property interests. In order to demonstrate the truth of this statement it is necessary first to analyze the provisions of the decree and then apply these provisions to the exhibition business.

(2) *Analysis of Competitive Bidding Provisions of Decree.*

In the memorandum (R., p. 3702) handed down simultaneously with the decree the Court said:

> "In order to meet some of the objections raised at the hearing to the system of bidding for features

described in the opinion of the court, we have modified the system there proposed so that competitive bidding will only be necessary within a competitive area and in such an area where it is desired by the exhibitors. In other words, the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so."

The opinion of June, 1946 extended auction selling to all pictures, features, news reels and shorts. The final decree limits competitive bidding to feature films (films in excess of 4000 feet in length) and to competitive areas, defining such an area as "the territory occupied by more than one theatre in which it may fairly and reasonably be said that such theatres compete with each other for the exhibition of pictures on any run" (R., pp. 3697-8).

The very definition of a "competitive area" is pregnant with litigation. Who is going to decide when two theatres are in a competitive area and the competitive bidding provisions of the decree become effective; the producer or the exhibitor? By what yardsticks will this decision be reached? If an agreement cannot be reached, inevitably the courts will have to decide the issue. This definition is so broad that its application may result in the elimination of all clearances, despite the fact that reasonable clearance is necessary for the successful operation of a theatre and was so found by the Court in the June, 1946 opinion (R., pp. 3530-1). Suppose theatre A competes with theatre B, and theatre C competes with theatre B but not theatre A—B must bid against both A and C but A need bid only against B. Any number of additional theatres and overlapping areas of competition could be included in this example but the simple illustration given makes clear the unfairness to exhibitors of the requirement of competitive bidding.

Assuming that a competitive area has been established, the decree would seem to provide for two methods of licensing features.

The first method is found in sub-paragraph (a) of paragraph 8, Section II, where the distributor is directed to offer the feature available for exhibition to every exhibitor who desires to exhibit the feature on some run selected by the exhibitor and upon uniform terms. The run selected must be different from the run in the distributor's own theatre, if any; meaning no doubt subsequent to the exhibition in the producer's theatre because under the decree the producer is given the right to show his own pictures in his own theatres. How the exhibitor makes known his desire to exhibit a feature or when the distributor makes his offer after receiving notice of an exhibitor's desire to show a feature and what happens after the exhibitors receive and reject an offer were left by the Court in a realm of conjecture and future court regulation. In any event, the practical application of this method would appear to be extremely limited.

It is when one undertakes to apply the second method which is prescribed in sub-paragraph (c) that the impracticability and harmful effects of competitive bidding more clearly appear. In considering this provision of the decree it must be borne in mind throughout that the independent exhibitor in an area where he competes with a producer-owned (major defendant) theatre (and this includes every major city and town), starts off under a most serious handicap because the producer-owned theatre is assured of months of features each year without bidding for them, and then is free to bid against the independent for all other available features in accordance with the prescribed method.

Sub-paragraph (c) invokes a complicated and confused system of offers and counter offers on an impracticable time

schedule and then directs the distributor to accept the offer made by the "highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the distributor". This sub-paragraph requires the distributor, unless the feature is to be run simultaneously in competing theatres in an area (an unheard of practice), to notify the exhibitors that the feature is available for license, and specifies the time in which bids shall be made by the exhibitors. Each exhibitor for his own protection must bid, as he cannot know that his competitor is not making a bid. The practical effect of this provision of the decree is to remove any optional feature which the Court may have intended. Since the decree requires that an offer must state (a) the run desired, (b) the amount the exhibitor is willing to pay either as a flat rental or on a percentage basis, or both or in any other form, (c) the clearance desired, (d) the time and days for exhibition and (e) any other "offers", by which the Court may have meant any other terms or even several offers, an equitable application of the yardstick quoted above is impossible. The obvious result will be that the producer can pick at will the offer he wants to accept without fear that a disgruntled exhibitor can successfully seek court relief on the ground that his offer should have been accepted, because there are too many variables for even a court to formulate and apply a workable yardstick for the purpose of making such determination.

In addition to the items which the Court requires shall be stated in each offer, there are many other items which also must be stated in order that there may be a meeting of minds. See Exhibit F-10 hereto annexed. Competitive bidding is clearly futile and the complications of such a system defeat its own end.

(3) *Disastrous Results to Independent Exhibitors.*

Other obvious disastrous results which will flow from the decreed competitive bidding are explained in detail in the motion to intervene in the District Court (R., p. 3578 ff.) and are summarized as follows:

1. The District Court specified in paragraph 8 that "each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others", destroying thereby the recognized policy in all industry founded upon years of experience that for business, moral, social and other reasons, where one outlet for a product has proved satisfactory, it should not be changed merely because someone else may temporarily offer a better price or promise other advantages. The Court, by this direction, has said that a distributor must not lean towards an old and satisfactory customer, who knows better how to market a picture, who is known to be honest in his dealings, who has built up a reputation for showing the distributor's pictures in his theatre over a period of years, who has become a prominent and valued citizen and who possesses other desirable attributes.

2. The larger theatres, with the larger resources, many of which are owned or operated by distributor-defendants, in the long run will be able to outbid independents operating smaller theatres having smaller resources, and so will obtain the bulk of the most desirable product. The smaller theatres will become mediocre theatres, exhibiting only features on a second and subsequent run basis, or cheaper and poorer features on a first run basis. Eventually they may be forced to close or sell out to competitors, thus fostering and encouraging monopolistic practices. Nor may this economic disparity be adjusted by Court decree. *Bigelow* v. *R K O Radio Pictures*, 162 F. (2d) 520, 522, certiorari denied November 10, 1947; 16 Law Week 3150.

3. The decreed method of licensing will increase admission prices to the detriment of the public and the exhibitor through the increase in film rentals due to (a) the increased cost of distribution, and (b) the inevitable result that exhibitors, in order to secure feature films, will bid more for them than they now pay through the existing system of negotiated licenses. It is simply a Court protected license to the producer to exact the highest possible price for his features from exhibitors.

4. The decreed method forbids and prevents the necessary post-exhibition adjustments, an accepted trade practice, by means of which film rentals are equitably adjusted in keeping with the results of exhibition, and proper allowances are made for errors in evaluation and for conditions affecting exhibition beyond the control of exhibitors and distributors.

5. Material loss will result to Intervenors under the proposed system, because of the uncertainty as to the result of bids for features, the delay in arranging programs, and the fact that an exhibitor may bid for too few or too many features, not knowing how many of his bids will be successful.

6. The provisions of sub-paragraph (c) of Paragraph 8 are impracticable as to the timing of bids and acceptances and the basis on which bids are to be submitted, and the respective rights of distributors and exhibitors thereunder are uncertain.

7. An independent exhibitor-owner or operator of two theatres equal in seating capacity to one larger theatre of a defendant or another exhibitor cannot successfully bid against such defendant, since the decree provides that each license must be offered and taken theatre by theatre and picture by picture.

(4) *The Authorities Support This Position.*

We have discussed above the factual situation and have demonstrated the damage which will be suffered by Intervenors and their property interests if the provisions complained of are included in the decree. We now discuss the legal principles applicable to these facts.

Judgment in the sense it is used in Rule 24, does not mean an actual judgment against Intervenors. It is enough that from a practical standpoint the effect of the judgment will be binding upon and prejudicial to Intervenors, and that they cannot secure relief to which they are entitled through other means. This was recognized by the District Court in its opinion (R., pp. 3541-2) when it is said:

> "While our decision will not be res adjudicata as to those not parties to the litigation, the parties are necessarily and properly bound, and indeed the decision is a judicial precedent against the others on the questions of law involved in those situations we have referred to where they have unreasonably restrained trade and commerce."

We have shown that Intervenors cannot conduct their business without the product of one or more of the defendants. Intervenors by reason of the decree will be compelled to submit to the market regulations imposed by the uniform action required of the defendants who control the supply of feature pictures. The decree deprives Intervenors of their present right to enjoin a combination controlling the market for feature film; they will be unable to sue for damages on account of injury caused them by the Court directed plan of competitive bidding.

It can scarcely be argued that this will not be the effect of the decree, because any independent action taken by Intervenors will be met by the defense that the defendants

are acting in accordance with the directions of the District Court. It should be noted that the rule not only covers cases where the Intervenors are bound as a matter of law, but also cases where they "may be bound". The Court retains jurisdiction for the purpose of further regulation of the business, should that be necessary. Intervenors will unavoidably have a direct interest in that further regulation from which the District Court has excluded them.

Nor is it necessary that Intervenors have a direct and immediate interest in the res. In a technical sense, there is no res in any anti-trust action. If interest in a res were necessary, there could never be intervention in an anti-trust suit. While such an interest is required under Rule 24 (a) (3), it is not required where intervention is sought as here under Rule 24 (a) (2). Such a requirement is contrary to the holdings of this Court in *Missouri-Kansas Pipe Line Co.* v. *U. S., supra* and *U. S.* v. *Terminal R. R. Assoc. of St. Louis, supra.*

This later case involved an appeal from the District Court from a denial of an application for leave to intervene made by persons and corporations conducting businesses along the lines of the Terminal R. R. Company. The effect of the decree was to enjoin the Terminal R. R. Company from conducting its transportation business in a manner which would permit it to serve the business of the Intervenors. The petition was denied on jurisdictional grounds, and there was a further appeal to the Supreme Court. Certain of those who had sought to intervene in the lower Court petitioned to intervene in the Supreme Court, seeking the same relief. The Government challenged their right. The Court stated at page 199:

> "The challenge by the United States of the right to hear the intervening petitioners is without merit, since even, although the petitioners were not parties,

they are entitled to be originally heard concerning the settlement of the decree insofar as it might operate prejudicially to their rights."

As stated above, the effect of the decreed competitive bidding will be to endanger the entire business of Intervenors in that their access to the feature film market is limited by a system imposed upon them which destroys all established relationships on which Intervenors now depend for their pictures, and only benefits the major distributors (defendants). All competition between sellers is eliminated. No reviewable criteria are possible by which the bidder can be selected. The choice must, therefore, lie entirely within the uncontrolled business judgment of the producer-distributors (defendants) who have already been held guilty of discrimination in violation of the Sherman Act.

Inevitably and inescapably Intervenors are bound by the decree.

B.

The representation of Intervenors' interests by existing parties was and continues to be inadequate.

We have already shown (pp. 6-7) that no party sought competitive bidding, and that the few expert witnesses who were questioned in regard to a system of auction selling were unanimous in stating that such a system will be harmful to producers, distributors and exhibitors alike. The position of the plaintiff-Government in the proceedings in the District Court appears in the following statement of counsel (R., p. 2800):

" • • • I do not think with all due respect that the Court in the time that it has to study the indus-

> try, is in a position to evolve for the defendants any new system as such to replace an existing system. We find that we get into trouble and we lead the courts into trouble when we try to do that."

And in the following quotation from the plaintiff's brief below:

> "Until the Court has decided that question and determined the general form that the dissolution of these combinations is to take, we do not believe that any final form of trade practice relief against all of the distributor defendants may be satisfactorily determined."

And in the final argument of Government's counsel (R., p. 2878):

> "Therefore it seems to us that the choice now before the Court, assuming that divorcement is unacceptable, is between the restricted system of competitive disposition of exclusive runs, including the ban on cross-licensing offered by the Government, or no so-called auction selling or competitive bidding system at all, unless the Court is prepared to adopt a system of selling films which only the major defendants desire."

Plaintiff now takes the position (R., p. 3722, assignment of error 10) that competitive bidding will not introduce competition into the present system of licensing pictures and that the Court erred in concluding (R., p. 3723, assignment of error 18) that competitive bidding will "make it impossible for the defendants to discriminate unreasonably in favor of circuit theatres and against the independents." The Government's assignment of error number 10 is in effect substantially the same as number 18. These assignments of error must be read in the light of the statements quoted above and of assignment number 25 (R., p. 3723)—that the Court erred in failing to decree divestiture.

cess to all books and papers of the defendants and the right to interview their officers or employees in order to secure compliance therewith. It has also by Section II, paragraph 9, of the decree enjoined defendants from an arbitrary refusal to grant an exhibitor a license to exhibit a feature on a run selected by him instead of granting such license to a competitor.

The Court says of the *present* system (unaffected by its correctives) that "the only way competition may be introduced into" it is by the directed competitive bidding plan (R., p. 3540). But it is submitted that the dissolution and trade practice reliefs proposed by the Court, other than the competitive bidding requirement, plainly will effect an alteration of "the present system", adequate to terminate any unlawful restraint of commerce by the defendants. This is demonstrated by a consideration of the several practices found to be illegal and which the Court seeks to remedy through competitive bidding, and of the effect of the other provisions of the decree upon the same.

Minimum admission prices, clearances and runs.

The charge in this respect by the Government was that these practices in the business of exhibiting motion pictures were controlled by a concert of the defendants. No discrimination was found. The injunctive relief directed as to clearances and runs simply relates to concerted action. Concerted action obviously could continue even under competitive bidding system, and it is difficult to see how any more can be done than to issue the injunction and leave any correction that may be required to the Attorney General under his visitorial powers, and to the legal remedies of any person injured.

As to minimum prices for admission, although the charge is only against the concerted fixing of the same, the decree does not limit the injunction simply to concerted action. However, the fixing of such minimum prices would necessarily be a matter of contract, and ample protection is afforded through the fact that such contracts are at all times open to inspection. The Court itself has partially recognized this in its Opinion (R., pp. 3529-30) by saying that the elimination of the fixing by distributors of admission prices will create an opportunity for exhibitors to compete as to admission prices, and may well benefit both exhibitors and the public.

Farmula deals, master contracts and franchises.

These, again, are all matters of contract and have been forbidden. The injunction in these respects is practically self-executing, and is sufficiently implemented by the interest of the independent and his reliance on the substantial body of case law which would permit him not only to institute contempt proceedings in this Court, but also to institute treble damage suits against any distributor violating the injunction.

Move-overs, extended and repeated runs.

Any breach of the injunctions against these practices would be so overt as to make such a breach practically impossible.

Block booking.

In this case, written contracts would, again, govern the situation, and any contract which sought to tie in the purchase of one license with the purchase of another would be illegal and unenforceable. The visitorial power of the

Attorney General would operate as well as the remedies open to the exhibitor.

In all of the above instances, the decree of the Court could be substantially carried out without competitive bidding, and would permit a system of private negotiation between supplier and customer, a system which has been approved in almost innumerable cases and is expressly protected by Congress in the Robinson-Patman Act. See *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565, 573; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127. Any exhibitor believing he was being discriminated against could avail himself of paragraph 9.

If time shall prove these expectations to have been ill-founded, then, the Court having reserved jurisdiction, additional remedies may be considered and invoked in the future.

POINT III.

The directions as to competitive bidding are not authorized under the Sherman Act but are directly contrary to the spirit of the Act.

While the wording of the decree is in the reasonable discretion of the District Court, it is felt that if the Statutory Court had been furnished with sufficient information as to the inevitable effects of competitive bidding on independent exhibitors, it would not have directed that this trade practice be made compulsory. But having fathered it, there was nothing the court could do except to try to eliminate some of its obvious difficulties and still retain the plan.

Section 4 of the Sherman Act, 15 U. S. C. A. § 4, invests the district courts with jurisdiction to "*prevent and re-*

strain" violations of the Act. Injunctive action is specifically authorized. In order to make the restraints effective, the Courts have held that positive directions are authorized to the end that the means used to effect the illegal acts be destroyed. Thus, in *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, the Supreme Court held valid the decree dissolving the combination, pointing out, however, that "one of the fundamental purposes of the statute is to protect, not to destroy, rights of property". The decree should not be needlessly destructive. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 219; *Jacob Siegel* v. *Federal Trade Commission*, 327 U. S. 608.

In *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185, the Court stated:

> "In considering the subject from both of these aspects three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."

and further in dealing with the question of whether there should be a permanent injunction or a receivership, the Court said:

> "* * * we do not think we can now direct the immediate application of either of these remedies. * * * to at once stay the movement in interstate commerce of the products which the combination or its cooperating forces produce or control might inflict in-

finite injury upon the public by leading to a stoppage of supply and a great enhancement of prices. The second because the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people."

In *Sugar Institute* v. *United States*, 297 U. S. 553, 604, the Court denied certain affirmative relief, saying that it

> "* * * might well prejudice rather than serve the interests of fair competition and obstruct the useful and entirely lawful activities of the refiners."

In *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, the Court generally sustained the District Court in directing remedial steps, but pointing out that

> "* * * we may not impose penalties in the guise of preventing future violations" (p. 409).

and

> "* * * the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people', as the Government has suggested" (pp. 409-10).

In *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 729, the Court said:

> "The Sherman Act is intended to prevent unreasonable restraints of commerce. * * * The federal courts have jurisdiction of suits to enjoin violations. Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices."

From all of the above certain principles may be deduced.

1. A Court can enjoin the acts found to be illegal and take necessary and reasonable steps to prevent future recurrences.

2. The measures must be remedial rather than punitive. The defendants cannot be put in a class by themselves.

3. Private rights may not be invaded except to the extent necessary in the interests of the public.

4. The Court may not assume legislative functions.

In dealing with the several trade practices found to be illegal, and which the Court seeks to correct, not only by injunction, but by the application of the competitive bidding plan, the test of legality has been compatibility with this plan, rather than the terms of the Sherman Act. Thus, in dealing with master agreements containing separate provisions for licensing pictures for each particular theatre, the Court finds no illegality "if there is an opportunity for exhibitors to bid for the same runs at the offered price" (R., p. 3541). As to franchises, a reason given for illegality is that they "necessarily contravene the plan of licensing each picture theatre by theatre to the highest bidder" (R., p. 3541). As to "move-overs", the Court finds them illegal because they are "incompatible with the system we have prescribed of bidding for pictures and runs theatre by theatre" (R., p. 3542). As to "overage-and-underage" provisions, they are forbidden because it would not be possible to "practically apply the bidding system we are establishing" (R., p. 3542).

It is submitted that to make this particular device the test of illegality is, in effect, to write it into the Sherman Act and thus to assume a legislative function.

We do not find a case in which a court has forbidden private negotiation between buyer and seller, nor is any such Congressional intent indicated. It is especially provided in the Robinson-Patman Act (15 U. S. C. A. Sec. 13) that nothing therein contained "shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade". If the Congress believes that discriminations in price between different purchasers of commodities of like grade and quantity do not require the remedy of requiring sales to be made only by public auction, is it not clear that it must take a similar view of such a restriction in a Sherman Act case in which the Court is dealing with the licensing of motion pictures? While conflicts between the Sherman Act and the Copyright Acts are inescapable, there seems no occasion in this instance for creating one by judicial direction. The danger of this precedent when applied to other industries and the damage it would cause to all forms of business is self-evident.

It is submitted that the direction for competitive bidding exceeds the authority of the Court in that it destroys a normal and legal method of dealing without promoting the public interest.

As previously stated and again reiterated, the result of the decree is to eliminate all competition between distributors and thus establish a combination in restraint of trade which the producer-distributors could not voluntarily establish because of the Sherman Act. It is no answer to this argument that a single producer, acting by itself, and not in pursuance of a plan adopted by all producers-defendants, can sell pictures by competitive bidding, and under such circumstances Intervenors would have no complaint. This

may be true. But in such a case independent exhibitors could induce other major distributors to sell on other terms. And if they were free to do so, it is scarcely conceivable that all of them would uniformly refuse, in the absence of collusive action. It is the enforced uniform plan, adopted by all defendants on order of the Court which is the essence of both the wrong and the injury to Intervenors. Even if voluntary competitive bidding were invoked by a number of defendants acting individually, necessary alterations and concessions could be made as occasions arose to meet the practicabilities of the situation and changing economic conditions. The court system imposes a rigid strait-jacket on the industry for the entire future so long as the decree stands.

Again it may be argued that Intervenors are still free, despite the decree, to institute independent suits to enforce whatever rights they may possess. But the intent and purpose of the Court's order was to set up a plan of action, common to all distributors to enforce competitive bidding. Clearly, if any intervenor seeks to enjoin that combination or to collect damages from defendants on account of their activities pursuant to the plan authorized by the Court, he will be met with the defense that defendants are required by the Court to carry out this system of uniform action.

For example, suppose that through the enforcement of the uniform competitive bidding system, film rentals are forced so high that many of these Intervenors find their profits destroyed. Or suppose that on account of the exercise of the uncontrolled business judgment of the defendants in selecting successful bidders, many of these Intervenors find their theatres unable to operate for lack of features. Or suppose through the operation of the system, a theatre is unable to assure itself of a future supply of

features, which assurance is necessary for its financial solvency. In these situations, any independent who brought a suit would be barred by the decree from a recovery.

The only answer would be that the Court below exceeded its jurisdiction. But certainly the District Court intends its decree to be a bar to any action by an independent which seeks relief inconsistent with its provisions—and there can be no question of the jurisdiction of that Court.

Conclusion.

1. Intervenors have not been adequately represented and their interests and property are adversely affected by the decree. They can only be restored to their rights by intervening in this proceeding and they are entitled to do so.

2. The provisions of Section II, paragraph 8, of the decree complained of should be eliminated. They set up a system which not only was not asked for by any of the parties but was affirmatively opposed by them on the few occasions that it was discussed and is unanimously opposed by the independent exhibitors who (presumably) were to benefit by the decree. There is no adequate evidence in the record justifying the Court in its conclusion that this system would either cure the ills sought to be cured or that it would not have serious harmful effects on the rights of innocent parties. Its impracticability has been clearly demonstrated. The modification of the provisions of the opinion by the later memorandum of the Court and the provisions of the decree is a tacit admission that the original directions were made without any real knowledge of their effects or any real comprehension of the complexities of the business involved. With competitive bidding eliminated the rights of any aggrieved exhibitor and of the public are amply protected by the reserved rights of the Attorney General, the

reservation of jurisdiction, the provisions of Section II, paragraph 9, of the decree, and finally by his unquestioned right to recover triple damages in a proper case.

3. The net result of the inclusion of these provisions is to punish the independent exhibitors who are innocent parties and to create a legally protected combination in restraint of trade for the benefit of the major defendants who were the persons against whom relief was sought.

If due weight is to be given to the lesson afforded by exhibitors' well founded fears in respect to the Consent Decree (R., p. 2750), and it is submitted that such weight should be given to them, then their present expectations and objections alone justify the elimination of competitive bidding.

Respectfully submitted,

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In short, the position of the Government is that if there is not to be divestiture, competitive bidding is an acceptable substitute. This is borne out by the concluding paragraph of the plaintiff's jurisdictional statement at page 22 thereof:

> "* * * If the District Court is right in its assumption that the untried and unenforceable competitive bidding relief is an adequate substitute for the traditional divestiture relief and complete prohibition of further agreement among the guilty defendants, traditionally applied in situations of this character, then a proceeding under Section 4 of the Sherman Act has become an instrument for protecting an established monopoly from either judicial or legislative correction."

Whomsoever the plaintiff may be said to have represented up to the time the June, 1946 opinion was rendered, since that time, as long as the Government does not actively oppose competitive bidding, it does not represent the Intervenors.

In the District Court one of the defendants (Universal) voiced opposition to competitive bidding but not on the grounds which Intervenors advance (R., p. 2978). The three so-called minor defendants, Universal, United and Columbia, have assigned as error the competitive bidding provisions of the decree (R., pp. 3802, 3782, 3760) but their position as producers or producer-distributors is so different from and in most ways so diametrically opposed to the position of Intervenors that in no sense can it be fairly said that they represent Intervenors.

It therefore clearly appears that the Intervenors have not been, are not now and will not be adequately represented by any of the existing parties. Indeed it is not a case of adequacy of representation for the Intervenors'

interests are not represented at all. This contention is fully supported by the decisions on facts which we believe to be far less persuasive.

Missouri-Kansas Pipe Line Co. v. *U. S.*, *supra*;

Wolpe v. *Poretsky*, 144 F. (2d) 505;

Mack v. *Passaic National Bank & Trust Co.*, 150 F. (2d) 474.

C.

The application to intervene was timely made.

The history of the facts leading up to the filing of the application to intervene is given in the original petition (R., p. 3578). That the petition was timely filed under the circumstances and has not delayed the rendition of the final decree so clearly appears from the record, and since no party has raised the question and the District Court said the point need not be argued (R., p. 2834), the point will not be further discussed.

D.

The motion to intervene in this Court should be granted.

Intervenors moved to intervene directly in this Court on the authority of the decision in *United States* v. *Terminal Railroad Assn. of St. Louis*, *supra*. In the case just cited, the petitioners were deprived of a legal right against a public utility. In the case at bar, except for the provisions of the decree of which Intervenors complain, they could have a clear legal right to enjoin a plan for concerted action by the distributors to enforce competitive bidding which the decree attempts to legalize. The decree, by approving that plan, cuts off Intervenors' legal right

as effectively as the intervenor's right was cut off in the *St. Louis Terminal* case.

The purpose of this suit is to safeguard private interests. As this Court said in *Missouri-Kansas Pipe Line Co. v. United States, supra,* in commenting upon the companion case of *United States v. Columbia Gas & Electric Corp.*, 27 F. Supp. 116, arguments with respect to the Attorney General's guardianship of public interest misconceive the basis of the right asserted by the intervenors as "where the enforcement of a public law also demands distinct safeguarding of private interests * * * the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion".

It would be a travesty of justice if intervention must be denied in a case as here where the Attorney General is not opposing the competitive bidding plan as such and therefore can be said to approve the combination in restraint of trade set up by the decree.

All of the arguments advanced above supporting the assertion that Intervenors should have been permitted to intervene in the District Court are equally applicable to intervention directly in this Court.

POINT II

The dissolution and trade practice reliefs, other than the competitive bidding requirement, will terminate the restraint of commerce by defendants found to be unlawful.

The Court in addition to the specific injunctive directions as to trade practices has provided that jurisdiction be retained in order to enforce compliance with its decree and has provided that the Attorney General have ac-

First. Restraint of Trade—(1) Price Fixing.

No film is sold to an exhibitor in the distribution of motion pictures. The right to exhibit under copyright is licensed. The District Court found that the defendants in the licenses they issued fixed minimum admission prices which the exhibitors agreed to charge, whether the rental of the film was a flat amount or a percentage of the receipts. It found that substantially uniform minimum prices had been established in the licenses of all defendants. Minimum prices were established in master agreements or franchises which were made between various defendants as distributors and various defendants as exhibitors and in joint operating agreements made by the five majors with each other and with independent theatre owners covering the operation of certain theatres.[4] By these later contracts minimum admission prices were often fixed for dozens of theatres owned by a particular defendant in a given area of the United States. Minimum prices were fixed in licenses of each of the five major defendants. The other three defendants made the same requirement in licenses granted to the exhibitor-defendants. We do not stop to elaborate on these findings. They are adequately detailed by the District Court in its opinion. See 66 F. Supp. 334–339.

[4] A master agreement is a licensing agreement or "blanket deal" covering the exhibition of features in a number of theatres, usually comprising a circuit.

A franchise is a licensing agreement, or series of licensing agreements, entered into as part of the same transaction, in effect for more than one motion picture season and covering the exhibition of features released by one distributor during the entire period of the agreement.

An independent as used in these cases means a producer, distributor, or exhibitor, as the context requires, which is not a defendant in the action, or a subsidiary or affiliate of a defendant.

The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants; a vertical one between each distributor-defendant and its licensees. The latter was based on express agreements and was plainly established. The former was inferred from the pattern of price-fixing disclosed in the record. We think there was adequate foundation for it too. It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement. *Interstate Circuit* v. *United States*, 306 U. S. 208, 226–227; *United States* v. *Masonite*, 316 U. S. 265, 275. That was shown here.

On this phase of the case the main attack is on the decree which enjoins the defendants and their affiliates from granting any license, except to their own theatres, in which minimum prices for admission to a theatre are fixed in any maner or by any means. The argument runs as follows: *United States* v. *General Electric Co.*, 272 U. S. 476, held that an owner of a patent could, without violating the Sherman Act, grant a license to manufacture and vend, and could fix the price at which the licensee could sell the patented article. It is pointed out that defendants do not sell the films to exhibitors, but only license them and that the Copyright Act (35 Stat. 1075, 1088, 17 U. S. C. § 1), like the patent statutes, grants the owner exclusive rights.[5] And it is argued that if the patentee can fix the price at which his licensee may sell the patented article, the owner of the copyright should be allowed the same privilege. It is maintained that such a privilege is essential to protect the value of the copyrighted films.

We start, of course, from the premise that so far as the Sherman Act is concerned, a price-fixing combination is

[5] See note 12, *infra*.

EXECUTIVE OFFICES
444 WEST 56th ST.
NEW YORK 19, N. Y.

TWENTIETH CENTURY-FOX FILM CORPORATION
FEATURE PRODUCTIONS

20

Reel Two

F&10

SCHEDULE

EXCHANGE _____ DATE _____ SALESMAN _____

THEATRE	EXHIBITOR	LOCATION OF THEATRE

PROD. NO.	TITLE OF PICTURES	CONSECUTIVE NO. OF DATE AND EXACT DATE OF WEEK WHEN RELEASED	EARNINGS GUARANTEED EXHIBITOR PER	DISTRIBUTOR'S SHARE OF GROSS RECEIPTS	GROSS RECEIPTS IN EXCESS OF WHICH DISTRIBUTOR'S SHARE IS DUE
	BLOCK NO.		$	%	$

ADMISSION PRICES PER PERSON — EXCLUDING TAXES

EVENINGS: Adults, Orchestra _____ Balcony _____ Children, Orchestra _____ Balcony _____

MATINEES: Adults, Orchestra _____ Balcony _____ Children, Orchestra _____ Balcony _____

RUN _____

CLEARANCE _____

[illegible]

IN WITNESS WHEREOF, the parties hereto have duly executed these presents this _____ day of _____, 19__.

Exhibitor: _____
An Individual—A Partnership—A Corporation
(strike out two)

By _____
Partner—Officer
(strike out one)

TWENTIETH CENTURY-FOX FILM CORPORATION

By _____

LICENSE AGREEMENT

AGREEMENT made between [illegible]

WITNESSETH: The parties hereto agree as follows:

1. LICENSE— [illegible]

2. (a) [illegible]

[illegible]

7. SELECTION OF PLAY DATES—Unless otherwise specified in the Schedule, the exhibition date or dates of each of the pictures shall be determined as follows:

(a) Subject to prior runs and clearance granted or hereafter granted by the Distributor to other exhibitors, the Distributor shall mail to the Exhibitor a notice in writing specifying the first date upon which each picture will become available for exhibition by the Exhibitor (which notice is hereinafter referred to as the "notice of availability" and which date is hereinafter referred to as the "available date"). Such notice shall be mailed to the Exhibitor at least fifteen (15) days before the available date therein specified.

(b) Within fourteen (14) days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates within the period commencing upon the available date and ending thirty (30) days thereafter and give to the Distributor written notice of the date or dates so selected.

(c) If such date or dates are acceptable to the Distributor it shall forthwith confirm the same in writing to the Exhibitor, and the Exhibitor shall exhibit the picture on such date or dates.

(d) If such date or dates are not acceptable to the Distributor it shall promptly notify the Exhibitor and the Distributor and the Exhibitor shall thereafter endeavor to agree upon mutually acceptable exhibition date or dates.

(e) If mutually acceptable exhibition date or dates have not been agreed upon within thirty (30) days after the mailing of the notice of availability, the Distributor shall designate in writing to the Exhibitor the date or dates upon which the picture shall be exhibited, and the Exhibitor shall exhibit the picture on such date or dates.

(f) If the Exhibitor is granted a first run of the pictures and shall fail for any reason to exhibit any such picture within thirty (30) days after the date or dates fixed as provided in subdivisions (a) to (e), inclusive, of this paragraph 7, or if the Exhibitor is granted a second run of the pictures and shall for any reason fail to exhibit any such picture within twenty-one (21) days after the date or dates fixed as provided in subdivisions (a) to (e), inclusive, of this paragraph 7, or if the Exhibitor is granted a run subsequent to a second run of the pictures and shall for any reason fail to exhibit any such picture within fourteen (14) days after the date or dates fixed as provided in subdivisions (a) to (e), inclusive, of this paragraph 7, the [illegible] by the Exhibitor and the Distributor may make such picture available to exhibitors to which it has been licensed for other runs. The Exhibitor shall, nevertheless, be obligated to exhibit the picture and pay therefor the license fees specified in the Schedule, and upon failure to exhibit the same to pay such license fee computed as provided in paragraph 4 hereof.

[illegible]

SUPREME COURT OF THE UNITED STATES

Nos. 79–86.—October Term, 1947.

The United States of America, Appellant,

79 v.

Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated et al.

Loew's, Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., et al., Appellants,

80 v.

The United States of America.

Paramount Pictures, Inc., and Paramount Film Distributing Corporation, Appellants,

81 v.

The United States of America.

Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., Appellants,

82 v.

The United States of America.

United Artists Corporation, Appellant,

83 v.

The United States of America.

Universal Pictures Company, Inc. (Sued herein as Universal Corporation and Universal Pictures, Company, Inc.), Universal Film Exchanges, Inc., and Big U. Film Exchange, Inc., Appellants,

84 v.

The United States of America.

Appeals from the District Court of the United States for the Southern District of New York.

American Theatres Association, Inc., Southern California Theatre Owners Association, Joseph Moritz et al., Appellants,

85 v.

The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation et al.

W. C. Allred, Charles E. Beach and Elizabeth L. Beach et al., Appellants,

86 v.

The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation et al.

[May 3, 1948.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases are here on appeal [1] from a judgment of a three-judge District Court [2] holding that the defendants had violated § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2, and granting an injunction and other relief. 66 F. Supp. 323; 70 F. Supp. 53.

The suit was instituted by the United States under § 4 of the Sherman Act to prevent and restrain violations of it. The defendants fall into three groups: (1) Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, which produce motion pictures, and their respective subsidiaries or af-

[1] Sec. 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29, and § 238 of the Judicial Code; as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345.

[2] The court was convened pursuant to the provisions of the Act of April 6, 1942, 56 Stat. 198, 199, 15 U. S. C. § 28.

filiates which distribute and exhibit films. These are known as the five major defendants or exhibitor-defendants. (2) Columbia Pictures Corporation and Universal Corporation, which produce motion pictures, and their subsidiaries which distribute films. (3) United Artist Corporation, which is engaged only in the distribution of motion pictures. The five majors, through their subsidiaries or affiliates, own or control theatres; the other defendants do not.

The complaint charged that the producer defendants had attempted to monopolize and had monopolized the production of motion pictures. The District Court found to the contrary and that finding is not challenged here. The complaint charged that all the defendants, as distributors, had conspired to restrain and monopolize and had restrained and monopolized interstate trade in the distribution and exhibition of films by specific practices which we will shortly relate. It also charged that the five major defendants had engaged in a conspiracy to restrain and monopolize, and had restrained and monopolized, interstate trade in the exhibition of motion pictures in most of the larger cities of the country. It charged that the vertical combination of producing, distributing, and exhibiting motion pictures by each of the five major defendants violated § 1 and § 2 of the Act. It charged that each distributor-defendant had entered into various contracts with exhibitors which unreasonably restrained trade. Issue was joined; and a trial was had.[3]

[3] Before trial, negotiations for a settlement were undertaken. As a result, a consent decree against the five major defendants was entered November 20, 1940. The consent decree contained no admission of violation of law and adjudicated no issue of fact or law, except that the complaint stated a cause of action. The decree reserved to the United States the right at the end of a three-year trial period to seek the relief prayed for in the amended complaint. After the end of the three-year period the United States moved for trial against all the defendants.

illegal *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *Masonite Corporation*, *supra*. We recently held in *United States* v. *Gypsum Co.*, 333 U. S. —, that even patentees could not regiment an entire industry by licenses containing price-fixing agreements. What was said there is adequate to bar defendants, through their horizontal conspiracy, from fixing prices for the exhibition of films in the movie industry. Certainly the rights of the copyright owner are no greater than those of the patentee.

Nor can the result be different when we come to the vertical conspiracy between each distributor-defendant and his licensees. The District Court stated in its findings:

> "In agreeing to maintain a stipulated minimum admission price, each exhibitor thereby consents to the minimum price level at which it will compete against other licensees of the same distributor whether they exhibit on the same run or not. The total effect is that through the separate contracts between the distributor and its licensees a price structure is erected which regulates the licensees' ability to compete against one another in admission prices."

That consequence seems to us to be incontestable. We stated in *United States* v. *Gypsum Co.*, *supra*, p. —, that "The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly." The same is true of the rewards of the copyright owners and their licensees in the present case. For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in

contemplation, seems to be wholly academic, as the District Court pointed out. It is, therefore, plain that *United States* v. *General Electric Co., supra,* as applied in the patent cases, affords no haven to the defendants in this case. For a copyright may no more be used than a patent to deter competition between rivals in the exploitation of their licenses. See *Interstate Circuit* v. *United States, supra,* p. 230.

(2). *Clearances and Runs.*

Clearances are designed to protect a particular run of a film against a subsequent run.[6] The District Court found that all of the distributor-defendants used clearance provisions and that they were stated in several different ways or in combinations: in terms of a given period between designated runs; in terms of admission prices charged by competing theatres; in terms of a given period of clearance over specifically named theatres; in terms of so many days' clearance over specified areas or towns; or in terms of clearances as fixed by other distributors.

The Department of Justice maintained below that clearances are unlawful *per se* under the Sherman Act. But that is a question we need not consider, for the District Court ruled otherwise and that conclusion is not challenged here. In its view their justification was found in the assurance they give the exhibitor that the distributor will not license a competitor to show the film either at the same time or so soon thereafter that the exhibitor's expected income from the run will be greatly

[6] A clearance is the period of time, usually stipulated in license contracts, which must elapse between runs of the same feature within a particular area or in specified theatres.

Runs are successive exhibitions of a feature in a given area, first-run being the first exhibition in that area, second-run being the next subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or management.

diminished. A clearance when used to protect that interest of the exhibitor was reasonable, in the view of the court, when not unduly extended as to area or duration. Thus the court concluded that although clearances might indirectly affect admission prices, they do not fix them and that they may be reasonable restraints of trade under the Sherman Act.

The District Court held that in determining whether a clearance is unreasonable, the following factors are relevant:

> (1) The admission prices of the theatres involved, as set by the exhibitors;
>
> (2) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;
>
> (3) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;
>
> (4) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor-defendant from such theatres;
>
> (5) The extent to which the theatres involved compete with each other for patronage;
>
> (6) The fact that a theatre involved is affiliated with a defendant-distributor or with an independent circuit of theatres should be disregarded; and
>
> (7) There should be no clearance between theatres not in substantial competition.

It reviewed the evidence in light of these standards and concluded that many of the clearances granted by the defendants were unreasonable. We do not stop to retrace those steps. The evidence is ample to show, as the District Court plainly demonstrated, see 66 F. Supp. pp. 343–346, that many clearances had no relation to the competi-

tive factors which alone could justify them.[7] The clearances which were in vogue had, indeed, acquired a fixed and uniform character and were made applicable to situations without regard to the special circumstances which are necessary to sustain them as reasonable restraints of trade. The evidence is ample to support the finding of the District Court that the defendants either participated in evolving this uniform system of clearances or acquiesced in it and so furthered its existence. That evidence, like the evidence on the price-fixing phase of the case, is therefore adequate to support the finding of a conspiracy to restrain trade by imposing unreasonable clearances.

The District Court enjoined defendants and their affiliates from agreeing with each other or with any exhibitors or distributors to maintain a system of clearances, or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. In view of the findings this relief was plainly warranted.

Some of the defendants ask that this provision be construed (or, if necessary, modified) to allow licensors in granting clearances to take into consideration what is reasonably necessary for a fair return to the licensor.

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[7] Thus the District Court found:

"Some licenses granted clearance to sell to all theatres which the exhibitor party to the contract might thereafter own, lease, control, manage, or operate against all theatres in the immediate vicinity of the exhibitor's theatre thereafter erected or opened. The purpose of this type of clearance agreements was to fix the run and clearance status of any theatre thereafter opened not on the basis of its appointments, size, location, and other competitive features normally entering into such determination, but rather upon the sole basis of whether it were operated by the exhibitor party to the agreement."

We reject that suggestion. If that were allowed, then the exhibitor-defendants would have an easy method of keeping alive at least some of the consequences of the effective conspiracy which they launched. For they could then justify clearances granted by other distributors in favor of their theatres in terms of the competitive requirements of those theatres, and at the same time justify the restrictions they impose upon independents in terms of the necessity of protecting their film rental as licensor. That is too potent a weapon to leave in the hands of those whose proclivity to unlawful conduct has been so marked. It plainly should not be allowed so long as the exhibitor-defendants own theatres. For in its baldest terms it is in the hands of the defendants no less than a power to restrict the competition of others in the way deemed most desirable by them. In the setting of this case the only measure of reasonableness of a clearance by Sherman Act standards is the special needs of the licensee for the competitive advantages it affords.

Whether the same restrictions would be applicable to a producer who had not been a party to such a conspiracy is a question we do not reach.

Objection is made to a further provision of this part of the decree stating that "Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof." We think that provision was justified. Clearances have been used along with price fixing to suppress competition with the theatres of the exhibitor-defendants and with other favored exhibitors. The District Court could therefore have eliminated clearances completely for a substantial period of time, even though, as it thought, they were not illegal *per se*. For equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid—in order to rid the trade or commerce of all taint of the conspiracy. *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724. The court

certainly then could take the lesser step of making them *prima facie* invalid. But we do not rest on that alone. As we have said, the only justification for clearances in the setting of this case is in terms of the special needs of the licensee for the competitive advantages they afford. To place on the distributor the burden of showing their reasonableness is to place it on the one party in the best position to evaluate their competitive effects. Those who have shown such a marked proclivity for unlawful conduct are in no position to complain that they carry the burden of showing that their future clearances come within the law. Cf. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 188.

(3) *Pooling Agreements; Joint Ownership.*

The District Court found the exhibitor-defendants had agreements with each other and their affiliates by which theatres of two or more of them, normally competitive, were operated as a unit, or managed by a joint committee or by one of the exhibitors, the profits being shared according to prearranged percentages. Some of these agreements provided that the parties might not acquire other competitive theatres without first offering them for inclusion in the pool. The court concluded that the result of these agreements was to eliminate competition *pro tanto* both in exhibition and in distribution of features,[4] since the parties would naturally direct the films to the theatres in whose earnings they were interested.

The District Court also found that the exhibitor-defendants had like agreements with certain independent exhibitors. Those alliances had, in its view, the effect of nullifying competition between the allied theatres and of making more effective the competition of the group against theatres not members of the pool. The court found that in some cases the operating agreements were

[4] A feature is any motion picture, regardless of topic, the length of film of which is in excess of 4,000 feet.

achieved through leases of theatres, the rentals being measured by a percentage of profits earned by the theatres in the pool. The District Court required the dissolution of existing pooling agreements and enjoined any future arrangement of that character.

These provisions of the decree will stand. The practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine.

There was another type of business arrangement that the District Court found to have the same effect as the pooling agreements just mentioned. Many theatres are owned jointly by two or more exhibitor-defendants or by an exhibitor-defendant and an independent.[9] The result

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[9] *Theatres jointly owned with independents:*

Paramount	993
Warner	20
Fox	66
RKO	187
Loew's	21
Total	1287

Theatres jointly owned by two defendants:

Paramount-Fox	6
Paramount-Loew's	14
Paramount-Warner	25
Paramount-RKO	150
Loew's-RKO	3
Loew's-Warner	5
Fox-RKO	1
Warner-RKO	10
Total	214

Of the 1287 jointly owned with independents, 209 would not be affected by the decree since one of the ownership interests is less than 5 per cent, an amount which the District Court treated as *de minimis*.

is; according to the District Court, that the theatres are operated "collectively, rather than competitively." And where the joint owners are an exhibitor-defendant and an independent the effect is, according to the District Court, the elimination by the exhibitor-defendant of "putative competition between itself and the other joint owner, who otherwise would be in a position to operate theatres independently." The District Court found these joint ownerships of theatres to be unreasonable restraints of trade within the meaning of the Sherman Act.

The District Court ordered the exhibitor-defendants to disaffiliate by terminating their joint ownership of theatres; and it enjoined future acquisitions of such interests. One is authorized to buy out the other if it shows to the satisfaction of the District Court and that court first finds that such acquisition "will not unduly restrain competition in the exhibition of feature motion pictures." This dissolution and prohibition of joint ownership as between exhibitor-defendants was plainly warranted. To the extent that they have joint interests in the outlets for their films each in practical effect grants the other a priority for the exhibition of its films. For in this situation, as in the case where theatres are jointly managed, the natural gravitation of films is to the theatres in whose earnings the distributors have an interest. Joint ownership between exhibitor-defendants then becomes a device for strengthening their competitive position as exhibitors by forming an alliance as distributors. An express agreement to grant each other the preference would be a most effective weapon to stifle competition. A working arrangement or business device that has that necessary consequence gathers no immunity because of its subtlety. Each is a restraint of trade condemned by the Sherman Act.

The District Court also ordered disaffiliation in those instances where theatres were jointly owned by an ex-

hibitor-defendant and an independent, and where the interest of the exhibitor-defendant was "greater than five per cent unless such interest shall be ninety-five per cent or more," an independent being defined for this part of the decree as "any former, present or putative motion picture theatre operator which is not owned or controlled by the defendant holding the interest in question." The exhibitor-defendants are authorized to acquire existing interests of the independents in these theatres if they establish, and if the District Court first finds that the acquisition "will not unduly restrain competition in the exhibition of feature motion pictures." All other acquisitions of such joint interests were enjoined.

This phase of the decree is strenuously attacked. We are asked to eliminate it for lack of findings to support it. The argument is that the findings show no more than the existence of joint ownership of theatres by exhibitor-defendants and independents. The statement by the District Court that the joint ownership eliminates "putative competition" is said to be a mere conclusion without evidentiary support. For it is said that the facts of the record show that many of the instances of joint ownership with an independent interest are cases wholly devoid of any history of or relationship to restraints of trade or monopolistic practices. Some are said to be rather fortuitous results of bankruptcies; others are said to be the results of investments by outside interests who have no desire or capacity to operate theatres, and so on.

It is conceded that the District Court made no inquiry into the circumstances under which a particular interest had been acquired. It treated all relationships alike, insofar as the disaffiliation provision of the decree is concerned. In this we think it erred.

We have gone into the record far enough to be confident that at least some of these acquisitions by the exhibitor-defendants were the products of the unlawful

practices which the defendants have inflicted on the industry. To the extent that these acquisitions were the fruits of monopolistic practices or restraints of trade, they should be divested. And no permission to buy out the other owner should be given a defendant. *United States* v. *Crescent Amusement Co.*, *supra*, p. 189; *Schine Chain Theatres, Inc.* v. *United States*, *ante*, p.—. Moreover, even if lawfully acquired, they may have been utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends of the conspiracy. In that event divestiture would likewise be justified. *United States* v. *Crescent Amusement Co.*, *supra*, pp. 189–190. In that situation permission to acquire the interest of the independent would have the unlawful effect of permitting the defendants to complete their plan to eliminate him.

Furthermore, if the joint ownership is an alliance with one who is or would be an operator but for the joint ownership, divorce should be decreed even though the affiliation was innocently acquired. For that joint ownership would afford opportunity to perpetuate the effects of the restraints of trade which the exhibitor-defendants have inflicted on the industry.

It seems, however, that some of the cases of joint ownership do not fall into any of the categories we have listed. Some apparently involve no more than innocent investments by those who are not actual or potential operators. If in such cases the acquisition was not improperly used in furtherance of the conspiracy, its retention by defendants would be justified absent a finding that no monopoly resulted. And in those instances permission might be given the defendants to acquire the interests of the independents on a showing by them and a finding by the court that neither monopoly nor unreasonable restraint of trade in the exhibition of films would result. In short, we see no reason to place a ban on this type of ownership, at least so long as theatre ownership

by the five majors is not prohibited. The results of inquiry along the lines we have indicated must await further findings of the District Court on remand of the cause.

(4) *Formula Deals, Master Agreements, and Franchises.*

A formula deal is a licensing agreement with a circuit of theatres in which the license fee of a given feature is measured, for the theatres covered by the agreement, by a specified percentage of the feature's national gross. The District Court found that Paramount and RKO had made formula deals with independent and affiliated circuits. The circuit was allowed to allocate playing time and film rentals among the various theatres as it saw fit. The inclusion of theatres of a circuit into a single agreement gives no opportunity for other theatre owners to bid for the feature in their respective areas and, in the view of the District Court, is therefore an unreasonable restraint of trade. The District Court found some master agreements[10] open to the same objection. Those are the master agreements that cover exhibition in two or more theatres in a particular circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit and to exhibit the features upon such playing time as it deems best, and leave other terms to the discretion of the circuit. The District Court enjoined the making or further performance of any formula deal of the type described above. It also enjoined the making or further performance of any master agreement covering the exhibition of features in a number of theatres.

The findings of the District Court in these respects are supported by facts, its conclusion that the formula deals and master agreements constitute restraint of trade is valid, and the relief is proper. The formula deals

[10] See note 4, *supra*.

and master agreements are unlawful restraints of trade in two respects. In the first place, they eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators. In the second place, the pooling of the purchasing power of an entire circuit in bidding for films is a misuse of monopoly power insofar as it combines the theatres in closed towns with competitive situations. The reasons have been stated in *United States* v. *Griffith*, *ante*, p. —, and *Schine Chain Theatres, Inc.* v. *United States*, *ante*, p. —, and need not be repeated here. It is hardly necessary to add that distributors who join in such arrangements by exhibitors are active participants in effectuating a restraint of trade and a monopolistic practice. See *United States* v. *Crescent Amusement Co.*, *supra*, p. 183.

The District Court also enjoined the making or further performance of any franchise. A franchise is a contract with an exhibitor which extends over a period of more than a motion picture season and covers the exhibition of features released by the distributor during the period of the agreement. The District Court held that a franchise constituted a restraint of trade because a period of more than one season was too long and the inclusion of all features was disadvantageous to competitors. At least that is the way we read its findings.

Universal and United Artists object to the outlawry of franchise agreements. Universal points out that the charge of illegality of franchises in these cases was restricted to franchises with theatres owned by the major defendants and to franchises with circuits or theatres in a circuit, a circuit being defined in the complaint as a group of more than five theatres controlled by the same

person or a group of more than five theatres which combine through a common agent in licensing films. It seems, therefore, that the legality of franchises to other exhibitors (except as to block-booking, a practice to which we will later advert) was not in issue in the litigation. Moreover, the findings on franchises are clouded by the statement of the District Court in the opinion that franchises "necessarily contravene the plan of licensing each picture, theatre by theatre, to the highest bidder." As will be seen hereafter, we eliminate from the decree the provision for competitive bidding. But for its inclusion of competitive bidding the District Court might well have treated the problem of franchises differently.

We can see how if franchises were allowed to be used between the exhibitor-defendants each might be able to strengthen its strategic position in the exhibition field and continue the ill effects of the conspiracy which the decree is designed to dissipate. Franchise agreements may have been employed as devices to discriminate against some independents in favor of others. We know from the record that franchise agreements often contained discriminatory clauses operating in favor not only of theatres owned by the defendants but also of the large circuits. But we cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit no matter how small. The findings do not deal with the issue doubtlessly due to the fact that any system of franchises would necessarily conflict with the system of competitive bidding adopted by the District Court. Hence we set aside the findings on franchises so that the court may examine the problem in the light of the elimination from the decree of competitive bidding.

We do not take that course in the case of formula deals and master agreements, for the findings in these instances seem to stand on their own bottom and apparently have no necessary dependency on the provision for competitive bidding.

(5) *Block-Booking.*

Block-booking is the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period. The films are licensed in blocks before they are actually produced. All the defendants, except United Artists, have engaged in the practice. Block-booking prevents competitors from bidding for single features on their individual merits. The District Court held it illegal for that reason and for the reason that it "adds to the monopoly of a single copyrighted picture that of another copyrighted picture which must be taken and exhibited in order to secure the first." That enlargement of the monopoly of the copyright was condemned below in reliance on the principle which forbids the owner of a patent to condition its use on the purchase or use of patented or unpatented materials. See *Ethyl Gasoline Corporation v. United States*, 309 U. S. 436, 459; *Morton Salt Co. v. Suppiger Co.*, 314 U. S. 488, 491; *Mercoid Corp. v. Mid-Continent Investment Co.*, 320 U. S. 661, 665. The court enjoined defendants from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.[11]

We approve that restriction. The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286

[11] Blind-selling is a practice whereby a distributor licenses a feature before the exhibitor is afforded an opportunity to view it. To remedy the problems created by that practice the District Court included the following provision in its decree:

"To the extent that any of the features have not been trade shown prior to the granting of the license for more than a single feature, the licensee shall be given by the licensor the right to reject twenty per cent of such features not trade shown prior to the granting of the license, such right of rejection to be exercised in the order of release

U. S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have. As the District Court said, the result is to add to the monop-

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within ten days after there has been an opportunity afforded to the licensee to inspect the feature."

The court advanced the following as its reason for inclusion of this provision:

"Blind-selling does not appear to be as inherently restrictive of competition as block-booking, although it is capable of some abuse. By this practice a distributor could promise a picture of good quality or of a certain type which when produced might prove to be of poor quality or of another type—a competing distributor meanwhile being unable to market its product and in the end losing its outlets for future pictures. The evidence indicates that trade-shows, which are designated to prevent such blind-selling, are poorly attended by exhibitors. Accordingly, exhibitors who choose to obtain their films for exhibition in quantities, need to be protected against burdensome agreements by being given an option to reject a certain percentage of their blind-licensed pictures within a reasonable time after they shall have become available for inspection."

We approve this provision of the decree.

oly of the copyright in violation of the principle of the patent cases involving tying clauses.[12]

It is argued that *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637, points to a contrary result. That case held that the inclusion in a patent license of a condition requiring the licensee to assign improvement patents was not *per se* illegal. But that decision, confined to improvement patents, was greatly influenced by the federal statute governing assignments of patents. It therefore has no controlling significance here.

Columbia Pictures makes an earnest argument that enforcement of the restriction as to block-booking will be very disadvantageous to it and will greatly impair its ability to operate profitably. But the policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest in a practice which contravenes the policy of the anti-trust laws receive judicial sanction.

We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted.

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[12] The exclusive right granted by the Copyright Act, 35 Stat. 1075, 17 U. S. C. § 1 includes no such privilege. It provides, so far as material here, as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

(6) *Discrimination.*

The District Court found that defendants had discriminated against small independent exhibitors and in favor of large affiliated and unaffiliated circuits through various kinds of contract provisions. These included suspension of the terms of a contract if a circuit theatre remained closed for more than eight weeks with reinstatement without liability on reopening; allowing large privileges in the selection and elimination of films; allowing deductions in film rentals if double bills are played; granting moveovers [13] and extended runs; granting road show privileges; [14] allowing overage and underage; [15] granting unlimited playing time; excluding foreign pictures and those of independent producers; and granting rights to question the classification of features for rental purposes. The District Court found that the competitive advantages of these provisions were so great that their inclusion in contracts with the larger circuits and their exclusion from contracts with the small independents constituted an unreasonable discrimination against the latter. Each discriminatory contract constituted a conspiracy between licensor and licensee. Hence the District Court deemed it unnecessary to decide whether the defendants had conspired among themselves to make these discriminations. No provision of the decree specifically enjoins these discriminatory practices

[13] A moveover is the privilege given a licensee to move a picture from one theatre to another as a continuation of the run at the licensee's first theatre.

[14] A road show is a public exhibition of a feature in a limited number of theatres, in advance of its general release, at admission prices higher than those customarily charged in first-run theatres in those areas.

[15] Underage and overage refer to the practice of using excess film rental earned in one circuit theatre to fulfill a rental committment defaulted by another.

because they were thought to be impossible under the system of competitive bidding adopted by the District Court.

These findings are amply supported by the evidence. We concur in the conclusion that these discriminatory practices are included among the restraints of trade which the Sherman Act condemns. See *Interstate Circuit v. United States, supra*, p. 231; *United States v. Crescent Amusement Co., supra*, pp. 182–183. It will be for the District Court on remand of these cases to provide effective relief against their continuance, as our elimination of the provision for competitive bidding leaves this phase of the cases unguarded.

There is some suggestion on this as well as on other phases of the cases that large exhibitors with whom defendants dealt fathered the illegal practices and forced them onto the defendants. But as the District Court observed, that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.

Second—Competitive Bidding.

The District Court concluded that the only way competition could be introduced into the existing system of fixed prices, clearances and runs was to require that films be licensed on a competitive bidding basis. Films are to be offered to all exhibitors in each competitive area.[16] The license for the desired run is to be granted to the highest responsible bidder, unless the distributor rejects

[16] Competitive bidding is required only in a "competitive area" where it is "desired by the exhibitors." As the District Court said, "the decree provides an opportunity to bid for any exhibitor in a competitive area who may desire to do so."

The details of the competitive bidding system will be found in 70 F. Supp. pp. 73–74.

all offers. The licenses are to be offered and taken theatre by theatre and picture by picture. Licenses to show films in theatres, in which the licensor owns directly or indirectly an interest of ninety-five per cent or more, are excluded from the requirement for competitive bidding.

Paramount is the only one of the five majors who opposes the competitive bidding system. Columbia Pictures, Universal, and United Artists oppose it. The intervenors representing certain independents oppose it. And the Department of Justice, which apparently proposed the system originally, speaks strongly against it here.

At first blush there is much to commend the system of competitive bidding. The trade victims of this conspiracy have in large measure been the small independent operators. They are the ones that have felt most keenly the discriminatory practices and predatory activities in which defendants have freely indulged. They have been the victims of the massed purchasing power of the larger units in the industry. It is largely out of the ruins of the small operators that the large empires of exhibitors have been built. Thus it would appear to be a great boon to them to substitute open bidding for the private deals and favors on which the large operators have thrived. But after reflection we have concluded that competitive bidding involves the judiciary so deeply in the daily operation of this nation-wide business and promises such dubious benefits that it should not be undertaken.

Each film is to be licensed on a particular run to "the highest responsible bidder, having a theatre of a size, location and equipment adequate to yield a reasonable return to the licensor." The bid "shall state what run such exhibitor desires and what he is willing to pay for such feature, which statement may specify a flat rental, or a percentage of gross receipts, or both, or any other form of rental, and shall also specify what clearance such exhibitor is willing to accept, the time and days when

such exhibitor desires to exhibit it, and any other offers which such exhibitor may care to make." We do not doubt that if a competitive bidding system is adopted all these provisions are necessary. For the licensing of films at auction is quite obviously a more complicated matter than the like sales for cash of tobacco, wheat, or other produce. Columbia puts these pertinent queries: "No two exhibitors are likely to make the same bid as to dates, clearance, method of fixing rental, etc. May bids containing such diverse factors be readily compared? May a flat rental bid be compared with a percentage bid? May the value of any percentage bid be determined unless the admission price is fixed by the license?"

The question as to who is the highest bidder involves the use of standards incapable of precise definition because the bids being compared contain different ingredients. Determining who is the most responsible bidder likewise cannot be reduced to a formula. The distributor's judgment of the character and integrity of a particular exhibitor might result in acceptance of a lower bid than others offered. Yet to prove that favoritism was shown would be well nigh impossible, unless perhaps all the exhibitors in the country were given classifications of responsibility. If, indeed, the choice between bidders is not to be entrusted to the uncontrolled discretion of the distributors, some effort to standardize the factors involved in determining "a reasonable return to the licensor" would seem necessary.

We mention these matters merely to indicate the character of the job of supervising such a competitive bidding system. It would involve the judiciary in the administration of intricate and detailed rules governing priority, period of clearance, length of run, competitive areas, reasonable return, and the like. The system would be apt to require as close a supervision as a continuous receivership, unless the defendants were to be entrusted with vast discretion. The judiciary is unsuited to affairs of business

management; and control through the power of contempt is crude and clumsy and lacking in the flexibility necessary to make continuous and detailed supervision effective. Yet delegation of the management of the system to the discretion of those who had the genius to conceive the present conspiracy and to execute it with the subtlety which this record reveals, could be done only with the greatest reluctance. At least such choices should not be faced unless the need for the system is great and its benefits plain.

The system uproots business arrangements and established relationships with no apparent overall benefit to the small independent exhibitor. If each feature must go to the highest responsible bidder, those with the greatest purchasing power would seem to be in a favored position. Those with the longest purse—the exhibitor-defendants and the large circuits—would seem to stand in a preferred position. If in fact they were enabled through the competitive bidding system to take the cream of the business, eliminate the smaller independents, and thus increase their own strategic hold on the industry, they would have the cloak of the court's decree around them for protection. Hence the natural advantage which the larger and financially stronger exhibitors would seem to have in the bidding gives us pause. If a premium is placed on purchasing power, the court-created system may be a powerful factor towards increasing the concentration of economic power in the industry rather than cleansing the competitive system of unwholesome practices. For where the system in operation promises the advantage to the exhibitor who is in the strongest financial position, the injunction against discrimination [17] is apt to hold an empty promise. In this connection it should be noted

[17] The competitive bidding part of the decree provides: "Each license shall be granted solely upon the merits and without discrimination in favor of affiliates, old customers or others."

that even though the independents in a given competitive area do not want competitive bidding, the exhibitor-defendants can invoke the system.

Our doubts concerning the competitive bidding system are increased by the fact that defendants who own theatres are allowed to pre-empt their own features. They thus start with an inventory which all other exhibitors lack. The latter have no prospect of assured runs except what they get by competitive bidding. The proposed system does not offset in any way the advantages which the exhibitor-defendants have by way of theatre ownership. It would seem in fact to increase them. For the independents are deprived of the stability which flows from established business relationships. Under the proposed system they can get features only if they are the highest responsible bidders. They can no longer depend on their private sources of supply which their ingenuity has created. Those sources, built perhaps on private relationships and representing important items of good will, are banned, even though they are free of any taint of illegality.

The system was designed, as some of the defendants put it, to remedy the difficulty of any theatre to break into or change the existing system of runs and clearances. But we do not see how, in practical operation, the proposed system of competitive bidding is likely to open up to competition the markets which defendants' unlawful restraints have dominated. Rather real danger seems to us to lie in the opportunities the system affords the exhibitor-defendants and the other large operators to strengthen their hold in the industry. We are reluctant to alter decrees in these cases where there is agreement with the District Court on the nature of the violations. *United States* v. *Crescent Amusement Co.*, *supra*, p. 185; *International Salt Co.* v. *United States*, 332 U. S. 392, 400. But the provisions for competitive bidding in these

cases promise little in the way of relief against the real evils of the conspiracy. They implicate the judiciary heavily in the details of business management if supervision is to be effective. They vest powerful control in the exhibitor-defendants over their competitors if close supervision by the court is not undertaken. In light of these considerations we conclude that the competitive bidding provisions of the decree should be eliminated so that a more effective decree may be fashioned.

We have already indicated in preceding parts of this opinion that this alteration in the decree leaves a hiatus or two which will have to be filled on remand of the cases. We will indicate hereafter another phase of the problem which the District Court should also reconsider in view of this alteration in the decree. But out of an abundance of caution we add this additional word. The competitive bidding system was perhaps the central arch of the decree designed by the District Court. Its elimination may affect the cases in ways other than those which we expressly mention. Hence on remand of the cases the freedom of the District Court to reconsider the adequacy of decree is not limited to those parts we have specifically indicated.

Third. Monopoly, Expansion of Theatre Holdings, Divestiture.

There is a suggestion that the hold the defendants have on the industry is so great that a problem under the First Amendment is raised. Cf. *Associated Press* v. *United States*, 326 U. S. 1. We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment. That issue would be focused here if we had any question concerning monopoly in the production of moving pictures. But monopoly in production was eliminated as an issue in these cases, as we have noted.

The chief argument at the bar is phrased in terms of monopoly of exhibition, restraints on exhibition, and the like. Actually, the issue is even narrower than that. The main contest is over the cream of the exhibition business—that of the first-run theatres. By defining the issue so narrowly we do not intend to belittle its importance. It shows, however, that the question here is not *what* the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run. The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspects under the Sherman Act. But it bears only remotely, if at all, on any question of freedom of the press, save only as timeliness of release may be a factor of importance in specific situations.

The controversy over monopoly relates to monopoly in exhibition and more particularly monopoly in the first-run phase of the exhibition business.

The five majors in 1945 had interests in somewhat over 17 per cent of the theatres in the United States—3,137 out of 18,076.[18] Those theatres paid 45 per cent

[18] The theatres which each of the five majors owned independently of the others were: Paramount 1,395 or 7.72 per cent; Warner 501 or 2.77 per cent; Loew's 135 or .74 per cent; Fox 636 or 3.52 per cent; RKO 109 or .60 per cent. There were in addition 361 theatres or about 2 per cent in which two or more of the five majors had joint interests. These figures exclude connections through film-buying or management contracts or through corporations in which a defendant owns an indirect minority stock interest.

These theatres are located in 922 towns in 48 States and the District of Columbia. For further description of the distribution of theatres see Bertrand, Evans, and Blanchard, The Motion Picture Industry—A Pattern of Control 15–16 (TNEC Monograph 43, 1941).

of the total domestic film rental received by all eight defendants.

In the 92 cities of the country with populations over 100,000 at least 70 per cent of all the first-run theatres are affiliated with one or more of the five majors. In 4 of those cities the five majors have no theatres. In 38 of those cities there are no independent first-run theatres. In none of the remaining 50 cities did less than three of the distributor-defendants license their product on first run to theatres of the five majors. In 19 of the 50 cities less than three of the distributor-defendants licensed their product on first run to independent theatres. In a majority of the 50 cities the greater share of all of the features of defendants were licensed for first-run exhibition in the theatres of the five majors.

In about 60 per cent of the 92 cities having populations of over 100,000, independent theatres compete with those of the five majors in first-run exhibition. In about 91 per cent of the 92 cities there is competition between independent theatres and the theatres of the five majors or between theatres of the five majors themselves for first-run exhibition. In all of the 92 cities there is always competition in some run even where there is no competition in first runs.

In cities between 25,000 and 100,000 populations the five majors have interests in 577 of a total of 978 first-run theatres or about 60 per cent. In about 300 additional towns, mostly under 25,000, an operator affiliated with one of the five majors has all of the theatres in the town.

The District Court held that the five majors could not be treated collectively so as to establish claims of general monopolization in exhibition. It found that none of them was organized or had been maintained "for the purpose of achieving a national monopoly" in exhibition. It found that the five majors by their present theatre

holdings "alone" (which aggregate a little more than one-sixth of all the theatres in the United States), "do not and cannot collectively or individually, have a monopoly of exhibition." The District Court also found that where a single defendant owns all of the first-run theatres in a town, there is no sufficient proof that the acquisition was for the purpose of creating a monopoly. It found rather that such consequence resulted from the inertness of competitors, their lack of financial ability to build theatres comparable to those of the five majors, or the preference of the public for the best equipped theatres. And the percentage of features on the market which any of the five majors could play in its own theatres was found to be relatively small and in nowise to approximate a monopoly of film exhibition.[19]

[19] The number of feature films released during the 1943-44 season by the eleven largest distributors is as follows:

	No. of Films	*Percentages of Total*	
		With "Westerns" included	*With "Westerns" excluded*
Fox	33	8.31	9.85
Loew's	33	8.31	9.85
Paramount	31	7.81	9.25
RKO	38	9.57	11.34
Warner	19	4.79	5.67
Columbia	41	10.32	12.24
United Artists	16	4.04	4.78
Universal	49	12.34	14.63
Republic	–29 features –30 "Westerns"	14.86	8.66
Monogram	–26 features –16 "Westerns"	10.58	7.76
PRC	–20 features –16 "Westerns"	9.07	5.97
Totals	397 335 without "Westerns"	100.00	100.00

Even in respect of the theatres jointly owned or jointly operated by the defendants with each other or with independents the District Court found no monopoly or attempt to monopolize. Those joint agreements or ownership were found only to be unreasonable restraints of trade. The District Court, indeed, found no monopoly on any phase of the cases, although it did find an attempt to monopolize in the fixing of prices, the granting of unreasonable clearances, block-booking and the other unlawful restraints of trade we have already discussed. The "root of the difficulties," according to the District Court, lay not in theatre ownership but in those unlawful practices.

The District Court did, however, enjoin the five majors from expanding their present theatre holdings in any manner.[20] It refused to grant the request of the Department of Justice for total divestiture by the five majors of their theatre holdings. It found that total divestiture would be injurious to the five majors and damaging to the public. Its thought on the latter score was that the new set of theatre owners who would take the place of the five majors would be unlikely for some years to give the public as good service as those they supplanted "in view of the latter's demonstrated experience and skill in operating what must be regarded as in general the largest and best equipped theatres." Divestiture was, it thought, too harsh a remedy where there was available the alternative of competitive bidding. It accordingly concluded that divestiture was unnecessary "at least until the efficiency of that system has been tried and found wanting."

It is clear, so far as the five majors are concerned, that the aim of the conspiracy was exclusionary, *i. e.* it was

[20] Excepted from this prohibition was the acquisition of interests in theatres jointly owned, a matter we have discussed in a preceding portion of this opinion.

designed to strengthen their hold on the exhibition field. In other words, the conspiracy had monopoly in exhibition for one of its goals, as the District Court held. Price, clearance, and run are interdependent. The clearance and run provisions of the licenses fixed the relative playing positions of all theatres in a certain area; the minimum price provisions were based on playing position—the first-run theatres being required to charge the highest prices, the second-run theatres the next highest, and so on. As the District Court found, "In effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible."

It is, therefore, not enough in determining the need for divestiture to conclude with the District Court that none of the defendants was organized or has been maintained for the purpose of achieving a "national monopoly," nor that the five majors through their present theatre holdings "alone" do not and cannot collectively or individually have a monopoly of exhibition. For when the starting point is a conspiracy to effect a monopoly through restraints of trade, it is relevant to determine what the results of the conspiracy were even if they fell short of monopoly.

An example will illustrate the problem. In the popular sense there is a monopoly if one person owns the only theatre in town. That usually does not, however, constitute a violation of the Sherman Act. But as we noted in *United States* v. *Griffith*, *ante*, p. —, and see *Schine Chain Theatres, Inc.* v. *United States*, *ante*, p. —, even such an ownership is vulnerable in a suit by the United States under the Sherman Act if the property was acquired, or its strategic position maintained, as a result of practices which constitute unreasonable restraints of trade. Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the prob-

lem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. As we have discussed in *Schine Chain Theatres, Inc.* v. *United States, ante,* p. —, the requirement that the defendants restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution. What findings would be warranted after such an inquiry in the present cases, we do not know. For the findings of the District Court do not cover this point beyond stating that monopoly was an objective of the several restraints of trade that stand condemned.

Moreover, the problem under the Sherman Act is not solved merely by measuring monopoly in terms of size or extent of holdings or by concluding that single ownerships were not obtained "for the purpose of achieving a national monopoly." It is the relationship of the unreasonable restraints of trade to the position of the defendants in the exhibition field (and more particularly in the first-run phase of that business) that is of first importance on the divestiture phase of these cases. That is the position we have taken in *Schine Chain Theatres, Inc.* v. *United States, ante,* p. —, in dealing with a projection of the same conspiracy through certain large circuits. Parity of treatment of the unaffiliated and the affiliated circuits requires the same approach here. For the fruits of the conspiracy which are denied the independents must also be denied the five majors. In this connection there is a suggestion that one result of the conspiracy was a geographical division of territory among the five majors. We mention it not to intimate that it is true but only to indicate the appropriate extent of the inquiry concerning the effect of the conspiracy in theatre ownership by the five majors.

The findings of the District Court are deficient on that score and obscure on another. The District Court in its

findings speaks of the absence of a "purpose" on the part of any of the five majors to achieve a "national monopoly" in the exhibition of motion pictures. First, there is no finding as to the presence or absence of monopoly on the part of the five majors in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities. Yet the *first-run* field, which constitutes the cream of the exhibition business, is the core of the present cases. Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224, 225, n. 59), and § 2 condemns monopoly of "any part" of trade or commerce. "Any part" is construed to mean an appreciable part of interstate or foreign trade or commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225. Second, we pointed out in *United States* v. *Griffith*, *ante* p. —, that "specific intent" is not necessary to establish a "purpose or intent" to create a monopoly but that the requisite "purpose or intent" is present if monopoly results as a necessary consequence of what was done. The findings of the District Court on this phase of the cases are not clear, though we take them to mean by the absence of "purpose" the absence of a specific intent. So construed they are inconclusive. In any event they are ambiguous and must be recast on remand of the cases. Third, monopoly power, whether lawfully or unlawfully acquired, may violate § 2 of the Sherman Act though it remains unexercised (*United States* v. *Griffith*, *ante*, p. —), for as we stated in *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809, 811, the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. The District Court, being primarily concerned with the number and extent of the theatre holdings of defendants, did not

address itself to this phase of the monopoly problem. Here also, parity of treatment as between independents and the five majors as theatre owners, who were tied into the same general conspiracy, necessitates consideration of this question.

Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se*. But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs. *United States* v. *Reading Co.*, 253 U. S. 26, 57; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, 269–270. Second, a vertically integrated enterprise, like other aggregations of business units (*United States* v. *Aluminum Co. of America*, 148 F. 2d 416), will consitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so. As we pointed out in *United States* v. *Griffith*, *ante*, p. —, n. 10, size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse. And the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power. See *United States* v. *Swift & Co.*, 286 U. S. 106, 116; *United States* v. *Aluminum Co. of America*, *supra*, p. 430. Likewise bearing on the question whether monopoly power is created by the vertical integration, is the nature of the market to be served (*United States* v. *Aluminum Co. of America*, *supra*, p. 430), and the lever-

age on the market which the particular vertical integration creates or makes possible.

These matters were not considered by the District Court. For that reason, as well as the others we have mentioned, the findings on monopoly and divestiture which we have discussed in this part of the opinion will be set aside. There is an independent reason for doing that. As we have seen, the District Court considered competitive bidding as an alternative to divestiture in the sense that it concluded that further consideration of divestiture should not be had until competitive bidding had been tried and found wanting. Since we eliminate from the decree the provisions for competitive bidding, it is necessary to set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand.

It follows that the provision of the decree barring the five majors from further theatre expansion should likewise be eliminated. For it too is related to the monopoly question; and the District Court should be allowed to make an entirely fresh start on the whole of the problem. We in no way intimate, however, that the District Court erred in prohibiting further theatre expansion by the five majors.

The Department of Justice maintains that if total divestiture is denied, licensing of films among the five majors should be barred. As a permanent requirement it would seem to be only an indirect way of forcing divestiture. For the findings reveal that the theatres of the five majors could not operate their theatres full time on their own films.[21] Whether that step would, in absence of competitive bidding, serve as a short range remedy in cer-

[21] The District Court found, "Except for a very limited number of theatres in the very largest cities, the 18,000 and more theatres in the United States exhibit the product of more than one distributor. Such theatres could not be operated on the product of only one distributor."

tain situations to dissipate the effects of the conspiracy (*United States* v. *Univis Lens Co.*, 316 U. S. 241, 254; *United States* v. *Bausch & Lomb Co.*, *supra*, p. 724; *United States* v. *Crescent Amusement Co.*, *supra*, p. 188) is a question for the District Court.

Fourth.

The consent decree created an arbitration system which had, in the view of the District Court, proved useful in its operation. The court indeed thought that the arbitration system had dealt with the problems of clearances and runs "with rare efficiency." But it did not think it had the power to continue an arbitration system which would be binding on the parties, since the consent decree did not bind the defendants who had not consented to it and since the government, acting pursuant to the powers reserved under the consent decree, moved for trial of the issues charged in the complaint. The District Court recommended, however, that some such system be continued. But it included no such provision in its decree.

We agree that the government did not consent to a permanent system of arbitration under the consent decree and that the District Court has no power to force or require parties to submit to arbitration in lieu of the remedies afforded by Congress for enforcing the antitrust laws. But the District Court has the power to authorize the maintenance of such a system by those parties who consent and to provide the rules and procedure under which it is to operate. The use of the system would not, of course, be mandatory. It would be merely an auxiliary enforcement procedure, barring no one from the use of other remedies the law affords for violations either of the Sherman Act or of the decree of the court. Whether such a system of arbitration should be inaugurated is for the discretion of the District Court.

Fifth—Intervention.

Certain associations of exhibitors and a number of independent exhibitors, appellant-intervenors in Nos. 85 and 86, were denied leave to intervene in the District Court. They appeal from those orders. They also filed original motions for leave to intervene in this Court. We postponed consideration of the original motions and of our jurisdiction to hear the appeals until a hearing on the merits of the cases.

Rule 24 (a) of the Rules of Civil Procedure, which provides for intervention as of right, reads in part as follows: "Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

The complaint of the intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these anti-trust suits. So far as the protection of the public interest in free competition is concerned, the interests of those intervenors was adequately represented. The intervenors, however, claim that the system of competitive bidding would have operated prejudicially to their rights. Cf. *United States* v. *St. Louis Terminal*, 236 U. S. 194, 199. Their argument is that the plan of competitive bidding under the control of the defendants would be a concert of action that would be illegal but for the decree. If pursuant to the decree defendants acted under that plan, they would gain immunity from any liability under the anti-trust laws which otherwise they might have to the intervenors. Thus, it is argued, the decree would affect their legal rights and be binding on them. The representation of their interests by the Department of Justice on that score was said to be inadequate since that agency

proposed the idea of competitive bidding in the District Court.

We need not consider the merits of that argument. Even if we assume that the intervenors are correct in their position, intervention should be denied here and the orders of the District Court denying leave to intervene must be affirmed. Now that the provisions for competitive bidding have been eliminated from the decree there is no basis for saying that the decree affects their legal rights. Whatever may have been the situation below, no other reason appears why at this stage their intervention is warranted. Any justification for making them parties has disappeared.

The judgment in these cases is affirmed in part and reversed in part, and the cases are remanded to the District Court for proceedings in conformity with this opinion.

So ordered.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 79–86.—October Term, 1947.

The United States of America, Appellant, 79 v. Paramount Pictures, Inc., Paramount Film Distributing Corporation, Loew's, Incorporated et al. Loew's, Incorporated, Radio-Keith-Orpheum Corporation, RKO Radio Pictures, Inc., et al., Appellants, 80 v. The United States of America. Paramount Pictures, Inc., and Paramount Film Distributing Corporation, Appellants, 81 v. The United States of America. Columbia Pictures Corporation and Columbia Pictures of Louisiana, Inc., Appellants, 82 v. The United States of America. United Artists Corporation, Appellant, 83 v. The United States of America. Universal Pictures Company, Inc. (Sued herein as Universal Corporation and Universal Pictures, Company, Inc.), Universal Film Exchanges, Inc., and Big U. Film Exchange, Inc., Appellants, 84 v. The United States of America.	Appeals from the District Court of the United States for the Southern District of New York.

American Theatres Association, Inc., Southern California Theatre Owners Association, Joseph Moritz et al., Appellants,

85 v.

The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation et al.

W. C. Allred, Charles E. Beach and Elizabeth L. Beach et al., Appellants,

86 v.

The United States of America, Paramount Pictures, Inc., Paramount Film Distributing Corporation et al.

[May 3, 1948.]

MR. JUSTICE FRANKFURTER, dissenting in part.

"The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." On this guiding consideration, the Court earlier this Term sustained a Sherman Law decree, which was not the outcome of a long trial involving complicated and contested facts and their significance, but the formulation of a summary judgment on the bare bones of pleadings. *International Salt Co.* v. *United States*, 332 U. S. 392, 400–401. The record in this case bespeaks more compelling respect for the decree fashioned by the District Court of three judges to put an end to violations of the Sherman Law and to prevent the recurrence, than that which led this Court not to find abuse of discretion in the decree by a single district judge in the *International Salt* case.

This Court has both the authority and duty to consider whether a decree is well calculated to undo, as far as is

possible, the result of transactions forbidden by the Sherman Law and to guard against their repetition. But it is not the function of this Court, and it would ill discharge it, to displace the district courts and write decrees *de novo*. We are, after all, an appellate tribunal even in Sherman Law cases. It could not be fairly claimed that this Court possesses greater experience, understanding and prophetic insight in relation to the movie industry, and is therefore better equipped to formulate a decree for the movie industry than was the District Court in this case, presided over as it was by one of the wisest of judges.

The terms of the decree in this litigation amount, in effect, to the formulation of a regime for the future conduct of the movie industry. The terms of such a regime, within the scope of judicial oversight, are not to be derived from precedents in the law reports, nor, for that matter, from any other available repository of knowledge. Inescapably the terms must be derived from an assessment of conflicting interests, not quantitatively measureable, and a prophecy regarding the workings of untried remedies for dealing with disclosed evils so as to advance most the comprehensive public interest.

The crucial legal question before us is not whether we would have drawn the decree as the District Court drew it, but whether, on the basis of what came before the District Court, we can say that in fashioning remedies it did not fairly respond to disclosed violations and therefore abused a discretion, the fair exercise of which we should respect and not treat as an abuse. Discretion means a choice of available remedies. As bearing upon this question, it is most relevant to consider whether the District Court showed a sympathetic or mere niggling awareness of the proper scope of the Sherman Law and the range of its condemnation. Adequate remedies are not likely to be fashioned by those who are not hostile to evils to be remedied. The District Court's opinion manifests a stout

purpose on the part of that court to enforce its thoroughgoing understanding of the requirements of the Sherman Law as elucidated by this Court. And so we have before us the decree of a district court thoroughly aware of the demands of the Sherman Law and manifestly determined to enforce it in all its rigors.

How did the District Court go about working out the terms of the decree some of which this Court now displaces? The case was before that court from October 8, 1945, to January 22, 1947. A vast body of the evidence which had to be considered below, and must be considered here in overturning the lower court's decree, consisted of documents. A mere enumeration of these documents, not printed in the record before us, required a pamphlet of 42 pages. It took 460 pages for a selection of exhibits deemed appropriate for printing by the Government. The printed record in this Court consists of 3,841 pages. It is on the basis of this vast mass of evidence that the District Court, on June 11, 1946, filed its careful opinion, approved here, as to the substantive issues. Thereafter, it heard argument for three days as to the terms of the judgment. The parties then submitted their proposals for findings of fact and conclusions of law by the District Court. After a long trial, an elaborate opinion on the merits, full discussion as to the terms of the decree, more than two months for the gestation of the decree, the terms were finally promulgated.

I cannot bring myself to conclude that the product of such a painstaking process of adjudication as to a decree appropriate for such a complicated situation as this record discloses was an abuse of discretion, arrived at as it was after due absorption of all the light that could be shed upon remedies appropriate for the future. After all, as to such remedies there is no test, ultimately, except the wisdom of men judged by events.

Accordingly, I would affirm the decree except as to one particular, that regarding an arbitration system for controversies that may arise under the decree. This raises a pure question of law and not a judgment based upon facts and their significance, as are those features of the decree which the Court sets aside. The District Court indicated that "in view of its demonstrated usefulness" such an arbitration system was desirable to aid in the enforcement of the decree. The District Court, however, deemed itself powerless to continue an arbitration system without the consent of the parties. I do not find such want of power in the District Court to select this means of enforcing the decree most effectively, with the least friction and by the most fruitful methods. A decree as detailed and as complicated as is necessary to fit a situation like the one before us is bound, even under the best of circumstances, to raise controversies involving conflicting claims as to facts and their meaning. A court could certainly appoint a master to deal with questions arising under the decree. I do not appreciate why a proved system of arbitration, appropriate as experience has found it to be appropriate for adjudicating numberless questions that arise under such a decree, is not to be treated in effect as a standing master for purposes of this decree. See *Ex parte Peterson*, 253 U. S. 300. I would therefore leave it to the discretion of the District Court to determine whether such a system is not available as an instrument of auxiliary enforcement. With this exception I would affirm the decree of the District Court.